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No. 93-___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RELIGIOUS TECHNOLOGY CENTER, CHURCH OF SCIENTOLOGY INTERNATIONAL, and CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

DAVID MAYO, ADVANCED ABILITY CENTER, ROBIN SCOTT, ADRIENNE SCOTT, RON LAWLEY, MORAG BELLMAINE, STEVEN BISBEY, ADVANCED ABILITY CENTER CANDACRAIG, ADVANCED ABILITY CENTER EAST GRINSTEAD, CHURCH OF THE NEW CIVILIZATION, HARVEY HABER, JOHN NELSON, JON ZEGEL, VIVIAN ZEGEL,

Real Parties In Interest–Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether mandamus is a proper remedy to correct a district court's abdication of is Article III jurisdiction to a special master on fundamental issues and claims in the case, as has been held by several other circuit courts?

2. Whether a district court unlawfully abdicates its Article III jurisdiction to a special master by permitting a special master to decide fundamental issues and claims in the case, including dismissal of the plaintiffs' claims and awarding of attorneys' fees, where the district court never reviews critical orders and recommendations of the special master and merely rubber stamps other dispositive orders and recommendations, without written or oral analysis, and without hearing or even meeting with the parties?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Religious Technology Center, the Church of Scientology International, and the Church of Scientology of California petition for a writ of certiorari to review an order of the United States Court of Appeals for the Ninth Circuit denying petitioners' request for writ of mandamus.

Opinions Below

The order of the court of appeals denying the petition for writ of mandamus (1a) is unreported. The order of the district court appointing a special master (3a) is unreported. The orders of the district court summarily approving orders of the special master (12a-32a) are unreported.[1]

Jurisdiction

The order of the court of appeals (1a) was filed on July 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Provisions Involved

Article III, § 1 of the Constitution of the United States provides:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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[1] Other decisions of the district court and the court of appeals in this case, not directly raised by this petition, are reported as follows: *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987); *Religious Technology Center* v. *Scott*, 660 F. Supp. 515 (C.D. Calif. 1987), *reversed*, 869 F. 2d 1306 (9th Cir. 1989); *Religious Technology Center* v. *Wollersheim*, 971 F. 2d 364 (9th Cir. 1992).

Statement

1. The underlying basis and early history of this lawsuit are set forth in the reported decisions of the court of appeals, *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), and of District Judge Pfaelzer, *Religious Technology Center* v. *Scott*, 660 F. Supp. 515 (C.D. Cal. 1987), *revs'd*. 869 F.2d 1306 (9th Cir. 1989). The "case originated in the theft in 1983 by Robin Scott of certain documents belonging to the plaintiff Church of Scientology International ["CSI"]. Plaintiffs and some defendants . . . regard these documents as religious scriptures, embodying part of the advanced technology practiced by Scientologists. In particular, the documents stolen included a series of bulletins describing a procedure known as 'New Era Dianetics for Operating Thetans,' 'NED for OTs' or 'NOTs'." *Scott*, 660 F. Supp. at 516. The theft occurred in Denmark, and "Danish authorities subsequently convicted Scott of burglary. While the stolen materials were returned, the Church maintains that copies were made and that [the defendants in this case] later acquired these copies" and used them to pass themselves off as providers of authorized Scientology religious services. *Wollersheim*, 796 F.2d at 1078.

Plaintiffs filed suit on January 31, 1985 in the Central District of California, naming as defendants not only Scott and his confederates in Europe, but also several United States-based former Scientologists (the "Mayo defendants"), including David Mayo and the Advanced Ability Center ("AAC"). The complaint alleged that AAC was run by the Mayo defendants as a center for the provision of services based upon distorted versions of Scientology writings and materials, both confidential and non-confidential, without approval of the hierarchical Church of Scientology.[2]

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[2] In October, 1985, a related lawsuit was filed against additional defendants for receiving and using the materials. The two cases were consolidated.

The complaint further alleged that the Mayo defendants had conspired and/or acted in concert with the Scott group to share and exploit the stolen documents, which had been written by L. Ron Hubbard, the founder of the Scientology religion, and constituted the most confidential and sacred services in the Scientology religion. The action alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and of common law and statutory trade secrets laws. The case was assigned to District Judge Pfaelzer, who, on July 15, 1985, denied the defendants' motion to dismiss the complaint. In August 1985, the Mayo defendants filed an answer and counterclaims alleging RICO violations, unfair competition, intentional infliction of emotional distress, antitrust violations, false designation/false description claims, and libel.

Late in 1985, the plaintiffs sought a preliminary injunction against wrongful exploitation of their stolen scriptures. In opposing the motion, the defendants claimed that Mayo was the principle author of the original Scientology documents, not L. Ron Hubbard, and that he therefore was able to and did write the new materials from memory. Judge Pfaelzer conducted a two day evidentiary hearing, after which she rejected Mayo's testimony as not credible[3] and found that the AAC materials were substantially identical to the plaintiffs' stolen materials. Judge Pfaelzer therefore preliminarily enjoined the defendants from "using, distributing, exhibiting or in any way publicly revealing" any version of certain enumerated higher level Church of Scientology materials.[4]

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[3] In a subsequent proceeding in this case, Judge Pfaelzer reemphasized that "This Court did not find Mayo to be a credible witness." *Religious Technology Center* v. *Scott*, 660 F. Supp. at 517-18.

[4] On appeal, the court of appeals reversed, holding, somewhat reluctantly, "that Congress did not intend to give private RICO plaintiffs any right to injunctive relief." *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076, 1088.

Thereafter, the estate of L. Ron Hubbard "registered a copyright in the NOTs materials with the United States Copyright Office . . . [and subsequently] executed a license agreement granting plaintiff Religious Technology Center ('RTC') an exclusive license to reproduce, distribute, and utilize NOTs . . . On December 5, 1986, [Judge Pfaelzer] granted plaintiffs leave to file an amended complaint stating a new claim for copyright infringement." *Religious Technology Center* v. *Scott*, 660 F. Supp. at 517. Plaintiffs also now alleged economic harm from defendants' actions. On December 15, 1986 and February 27, 1987, Judge Pfaelzer denied defendants' motions for summary judgment and to dismiss the old and the amended complaints.

2. On May 24, 1989, Judge Pfaelzer unexpectedly recused herself from the case and transferred it directly to District Judge James M. Ideman. Judge Ideman immediately appointed as Special Master James G. Kolts, a retired Superior Court Judge (3a). Judge Ideman gave Special Master Kolts plenary power over all pretrial aspects of the cases, putatively reserving review of Special Master Kolts' rulings to the district court. The Churches' petition for a writ of mandamus to vacate the appointment was denied on June 27, 1990.

Special Master Kolts then began to preside, essentially for all purposes. Judge Ideman never met with the parties or counsel, never held a conference, never heard oral argument, never conducted an evidentiary hearing, and never wrote a word of analysis concerning the ultimate factual or legal issues involved in this case.

Special Master Kolts' first act was to issue an opinion recommending dismissal of the RICO claims, in the face of Judge Pfaelzer's holding that plaintiffs had stated a valid RICO claim. On March 7, 1990, Judge Ideman signed a boilerplate "Order Adopting Findings, Conclusions and Recommendations of Special Master Re RICO and Pendent Claims," which merely stated, "The Court has reviewed the Reports and Recommen-

dations of the Special Master . . . [and] hereby adopts the Reports and Recommendations of the Special Master . . ." (12a-13a).

A similar pattern was followed by Judge Ideman in adopting in boiler-plate fashion the special master's "recommendations" denying plaintiffs' motions for summary judgment seeking dismissal of the defendants' counterclaims for intentional infliction of emotional distress and libel (14a, 16a). No attempt at analysis was essayed in either instance.

With respect to several other motions potentially dispositive of various claims, Judge Ideman withheld decision on plaintiffs' objections to the special master's recommendations for periods ranging up to nearly two years, before ultimately summarily denying the objections as moot in light of his Rule 37 dismissal of all of plaintiffs' claims.[5] This failure to address objections to the special master's rulings played a decisive role in the final resolution of the plaintiffs' claims, because the special master then treated (and was permitted to treat) his unreviewed "recommendations" as if they were binding rulings, and to impose dispositive sanctions upon plaintiffs for not complying with recommendations which putatively were under review by the district judge. When the special master finally "recommended" dismissal of plaintiffs' claims in their entirety, the district court rubber stamped that recommendation and then dismissed as "moot" plaintiffs objections to the earlier "recommendations" upon which the ultimate sanction orders were based.

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[5] Thus, plaintiffs timely objected to the special master's November 20, 1990 denial of their motion for partial summary judgment establishing that Mr. Hubbard was the author of the NOTs materials; likewise, they timely objected to Special Master Kolts August 20, 1991 dismissal of their breach of contract claim; likewise they timely objected to his April 26, 1991 order imposing against them "issues" sanctions on the authorship issue for failure to provide discovery. None of these objections were decided on the merits, but instead were dismissed on August 28, 1992 as moot (20a) following Judge Ideman's July 30, 1992 order (18a) approving Special Master Kolts' "recommendation" of dismissal of all of plaintiffs' claims under Rule 37, F.R. Civ. P.

The failure of the district court to rule in a timely fashion on the special master's order of April 26, 1991 imposing "issues" sanctions for failure to provide discovery dramatically highlights the district judge's abdication of his responsibilities. On April 3, 1990, the special master ordered the plaintiffs to produce all notes in their possession concerning the creation of the NOTs materials, which assertedly was relevant on the question of the extent of Mayo's role, if any, in that process. Plaintiffs had submitted declarations that there were no such notes in their possession or control other than what already had been produced and the tapes and transcripts of L. Ron Hubbard creating the materials, which had been sealed in the district court's file since December 20, 1988. Defendants relied on the declarations of Mayo (who had been found to be not credible on this very subject by Judge Pfaelzer) and of Vicki Aznaran, a litigant seeking millions of dollars in damages from these plaintiffs in another proceeding, in arguing that plaintiffs had additional materials. The special master, without holding a hearing or reviewing the tapes already lodged with the court which preserved the authorship process, resolved this dispute in defendants' favor in ordering the plaintiffs to produce.

The district court summarily approved the discovery order on May 7, 1990, without hearing or argument (23a). For the first time, the district court devoted two sentences to plaintiffs' arguments:

> The Court finds that the Special Master's discovery order is not burdensome or improper because the Special Master only directs plaintiffs . . . to respond to defendants' discovery requests to the extent plaintiffs . . . have custody or control over the documents requested. Moreover, if plaintiffs . . . have already complied with defendants' discovery requests, plaintiffs . . . are in compliance with the Special Master's discovery order.

(23a-24a). This admonition, however, subsequently was repeatedly ignored by the special master, and the district court never again acknowledged plaintiffs' arguments with respect to it in

subsequent objections to the special master's discovery and sanctions orders.

On July 25, 1990, the special master further ordered plaintiffs to produce documents in discovery on matters relating to the issue of the scriptural authorship issue and to defendants' antitrust counterclaim. Plaintiffs had objected to these requests on essentially two grounds: (1) With respect to certain documents, they either did not exist or plaintiffs did not have possession or control over them; (2) the discovery on the authorship and antitrust issues was highly intrusive into the Churches' ecclesiastical doctrine, structure, and governance, and should therefore at least be stayed pending determination by the special master and the court of plaintiffs' motions for partial summary judgment on issues of authorship of the materials, the work-for-hire doctrine, and the antitrust counterclaims. These objections to the special master's July 25, 1990 discovery order were raised to the district court. In response, on October 31, 1990, Judge Ideman continued consideration of the objections until determination of the pending motions.[6]

On March 1, 1991, defendants moved to dismiss plaintiffs' claims as a sanction under Rule 37, F.R. Civ. P., for plaintiffs' failure to comply with discovery. Plaintiffs had not provided additional discovery pursuant to the special master's April 3 and July 25, 1990 discovery orders, for two reasons: (1) they did not possess or control any additional documents responsive to the April 3, 1990 order, and thus could not produce them, as recognized in Judge Ideman's May 7, 1990 order; (2) they had objected to the July 25, 1990 order on the basis of the pending partial summary judgment motions, one of which had been granted and the others of which were still pending,[7] and Judge Ideman had deferred consideration of their objections.

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[6] Indeed, on October 18, 1990, the special master had recommended *granting* the plaintiffs' summary judgement motion on the antitrust claims, thereby seemingly mooting a good portion of defendants' discovery requests.

[7] On June 4, 1991, Special Master Kolts recommended granting plaintiffs' summary judgment motion that Mayo's contribution to NOTs, if any, was

Nevertheless, on April 26, 1991, Special Master Kolts, while denying defendants' motion to dismiss, imposed issue-related sanctions on the authorship issue, to wit, that plaintiff Mayo had "substantial participation in the drafting of NOTs." This sanction was based exclusively on the Special Master's conclusion, *without holding a hearing* and in the face of contrary declarations by plaintiffs, that plaintiffs possessed and controlled, or had destroyed, relevant documents. Plaintiffs timely filed their objections to this sanctions order, which was held by Judge Ideman for over one year and never ruled upon on the merits.

On August 13, 1991, Judge Ideman denied the plaintiffs' objections to the special master's discovery order of July 25, 1990 (25a), despite the fact that the plaintiffs had already won dismissal of the antitrust counterclaim (defendants filed no objection), and had won the work-for-hire authorship issue (at least pending the district judge's determination of the defendants' objections). The reason given by Judge Ideman for doing so was that: "plaintiffs have been extremely evasive with respect to their discovery obligations . . . [and] are already in violation of several Court orders . . . In fact, discovery responses by plaintiffs in this case have either been incomplete or inadequate" (26a).

At the time of this ruling, the *only* finding that plaintiffs had improperly withheld discovery was the special master's April 26, 1991 order of issue-related sanctions. As noted, the district court had not and never did rule on plaintiffs' objections to that order. By so predicating its August 13, 1991 order on the special master's unreviewed sanctions order of April 26, 1991, the district court afforded conclusive effect to the special master's sanctions order. Moreover, the district court previously had postponed consideration of plaintiffs' objections to the special master's July 25, 1990 discovery order pending determination

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on a work-for-hire basis. Defendants objected to this order, and, once again, Judge Ideman held it for over one year and never ruled upon it on the merits, ultimately denying it as moot.

of the partial summary judgment motions. The district court, in its August 13, 1991 order, thus denied and refused to rule on the merits of those objections on the basis that plaintiffs, relying in part on the district court's order of continuance, had held back compliance pending the district judge's ruling on the motion. In this way, the district court further gave final and conclusive effect to the special master's rulings without subjecting them to Article III consideration on the merits.

4. Following Judge Ideman's order of August 13, 1991, defendants filed a new motion to dismiss the plaintiffs' claims in their entirety as a Rule 37 discovery sanction. The special master promptly granted it, relying principally on two factors: (1) his prior issues-oriented sanction motion, which, as we have shown, was based upon the special master's resolution of disputed facts without holding a hearing, *and which had never been and never was reviewed by the district judge*; and (2) plaintiffs' failure to produce documents while the partial summary judgments were being considered (and ultimately won by plaintiffs). With respect to the latter, once again, plaintiffs had sought district court review of the special master's decision that such documents had to be produced whether or not the underlying claims survived, and, once again, the district court never decided the issue on the merits.

The district judge summarily approved the special master's Rule 37 dismissal order without discussion of the factual or legal issues (18a). In this way, the special master's earlier unreviewed orders became the predicate for the dismissal of plaintiffs' claims.

5. Defendants then filed a motion seeking attorneys fees of nearly $2.9 million. Despite the fact that plaintiffs had prevailed on numerous issues and at various stages of the litigation, and despite the fact that plaintiffs raised substantial factual issues about the fee request, the special master granted the request, in its entirety, without permitting plaintiffs discovery and without holding an evidentiary hearing. The district

judge approved the order, without change or modification, without hearing or oral argument, and without writing an explanation addressing the legal or factual issues involved. In fact, the district judge merely affixed his signature to the proposed order submitted by defendant's counsel, crossing out the word "proposed" and otherwise changing not a jot or comma (28a).

6. Plaintiffs petitioned for writ of mandamus in the United States Court of Appeals for the Ninth Circuit. The petition was opposed by defendants, principally on the ground that under Ninth Circuit law, mandamus is not appropriate unless the issue raised can never be raised by appeal. See *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977). Judge Ideman's response to the petition was to announce that he was recusing himself from further proceedings in the lawsuit, *i.e.*, the adjudication of defendants' counterclaims.

While one panel of the Ninth Circuit had specifically required defendants and requested Judge Ideman to respond to the petition, a second panel summarily denied the petition without comment (1a), presumably on the basis of the *Bauman* case.

REASONS FOR GRANTING THE WRIT

This case raises the question of whether mandamus relief is available to a party who can show that a district court has abdicated its responsibilities under Article III of the Constitution by permitting a special master to decide fundamental issues of liability, subject only to the district court's *pro forma* rubber stamping of the special master's orders. The Ninth Circuit's decision denying mandamus review of such an abdication of the judicial role is in conflict with the decision of this Court in *LaBuy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), as well as with the decisions of the other circuits which have addressed the question. *See, In re Bituminous Coal Operators Association*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987); *Prudential Insur-*

ance Company v. *United States Gypsum Company*, 991 F.2d 1080, 1083 (3rd Cir. 1993).

Moreover, the Ninth Circuit's inflexible adherence to its *Bauman* rule in cases such as this results in a fundamental undermining of the *traditional* role of mandamus review, *i.e.*, to restrict a district court to its jurisdiction or to compel it to exercise its Article III jurisdiction in circumstances where it has abdicated its constitutional and statutory role. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *Will* v. *United States*, 389 U.S. 90, 95 (1967). Mandamus has always been available in such circumstances, despite the fact that the district court's jurisdictional error is ordinarily correctable on appeal.

Finally, the case addresses a problem which has appeared with disturbing frequency in recent years, *i.e.*, district court abdication of judicial duties to a special master. Several courts of appeals have addressed the problem, and have held that a district court may not rubber stamp the decisions of a special master on important issues in the case. *See, e.g., In re Bituminous Coal Operators Association, supra; In re United States, supra; Burlington Northern Railroad Co.* v. *Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991); *Stauble* v. *Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992). It is appropriate and necessary for this Court to provide overall guidance on the question, and to insure that courts of appeals utilize their mandamus powers to correct district court abdications of their Article III roles.

I. MANDAMUS IS THE PROPER REMEDY WHERE A DISTRICT COURT ABDICATES ITS ARTICLE III JURISDICTION TO A SPECIAL MASTER, AS SEVERAL OTHER COURTS OF APPEALS HAVE HELD

While the use of the peremptory writ of mandamus has always been reserved for "exceptional circumstances," *Will* v. *United States* 389 U.S. 90, 95 (1967), it "traditionally" has been available when a district court has either usurped juris-

diction or failed to exercise jurisdiction conferred upon it. *Id.* Indeed, the core of the mandamus power historically has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). See *De Beers Consol. Mines Ltd.* v. *United States*, 325 U.S. 212, 217 (1945); *Ex Parte Peru*, 318 U.S. 578 (1943).

While this court has emphasized that use of the writ is not restricted to "technical definition[s]" of jurisdiction, *Will* v. *United States*, 389 U.S. at 95, and even has permitted use of mandamus to permit the courts of appeals to supervise the administration of justice in the district courts, *La Buy* v. *Howes Leather Co.*, 352 U.S. 104 (1964); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), these latter cases must be seen as growing out of the fundamental core of mandamus jurisdiction—to prevent judicial "usurpation" or abdication of power. *De Beers Consolidated Mines, Ltd.*, 325 U.S. at 217. Viewed in this perspective, *La Buy* authorized the use of the writ against an improper referral to a special master precisely because the district court had failed to exercise its jurisdiction as an Article III court.

Numerous courts of appeals, both prior to and following *La Buy*, have granted mandamus to correct improper use of a master. In *In re Bituminous Coal Operators Association*, 949 F.2d 1165 (D.C. Cir. 1991), the District of Columbia Circuit "grant[ed] the writ . . . because [the district judge] has no discretion to impose on parties against their will 'a surrogate judge,' a substitute from the private bar charged with responsibility for adjudication of the case." 949 F.2d at 1168, citing *La Buy*. Similarly, the Sixth Circuit recently reiterated its view that mandamus is warranted "where the interlocutory order at issue 'deprives the parties of a trial before the court on the basic issues involved in the litigation.' " *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987), quoting from *Vickers Motors, Inc.* v. *Wellford*, 502 F.2d 967, 968 (6th Cir. 1974), and

La Buy. The Third Circuit recently came to a similar conclusion in *Prudential Insurance Company* v. *United States Gypsum Company*, 991 F.2d 1080, 1083 (3rd Cir. 1993). See also *Arthur Murray Inc.* v. *Oliver*, 364 F.2d 28 (8th Cir. 1966) (mandamus granted to correct improper reference to master, relying on *La Buy*); *In re Watkins*, 271 F.2d 771, 773 (5th Cir. 1959) (same; mandamus proper "where the reference to a Master is 'so palpably improper' that the rules have been practically nullified' "); *United States* v. *Kirkpatrick*, 186 F.2d 393 (3rd Cir. 1951) (pre-*La Buy* case; mandamus petition, relief granted); 5A Moore, *Moore's Federal Practice*, ¶ 53.05(3), pp. 53-71, 2 (1992 ed.)

Indeed, the case law supporting the use of mandamus to correct improper reference to or use of a master is analogous and equivalent to the clear body of law holding that mandamus must be permitted "where necessary to protect the constitutional right to trial by jury." *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 472 (1962); *Wilmington Trust* v. *United States District Court*, 934 F.2d 1026, 1028 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1578 (1992). In both instances, the office of the writ is to ensure that the parties may present their case to the individual or body specified by the Constitution; in both instances, the court of appeals acts to correct a usurpation or abdication of judicial power by the district court.

Perhaps in reaction to an overuse of the writ as a "supervisory" device, the Court of Appeals for the Ninth Circuit has developed a set of five criteria to govern the issuance of mandamus:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires. . . .
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.). . . .

(3) The district court's order is clearly erroneous as a matter of law. . . .

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . .

(5) The district court's order raises new and important problems, or issues of law of first impression. . . .

Bauman v. *United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (citations omitted). These criteria have become the standard by which petitions for mandamus are measured in the Ninth Circuit. *See, e.g., National Org. for the Reform of Marijuana Laws* v. *Mullen*, 828 F.2d 536, 542 (9th Cir. 1987).

It is readily apparent that at least several of the *Bauman* criteria—such as the presence of novel questions or oft-repeated error—were directed at the use of supervisory mandamus. Others, such as the availability or non-availability of an appellate remedy, often are in conflict, and were not previously deemed to offer sure signposts to the availability of the writ. Most significantly, the *Bauman* criteria make no mention of the traditional grounds for mandamus: a usurpation or abdication of Article III jurisdiction or power by the district court. While the intention of the Ninth Circuit to protect against an overgenerous use of the writ was perhaps laudable, the effect has been to make mandamus often virtually unobtainable in the traditional contexts in which the writ historically was used. Thus, for example, when a district court acts beyond its jurisdiction or abdicates its judicial responsibilities, the aggrieved party can usually appeal, if not immediately then at some point in the proceedings, and the error may not be common or, alternatively, raise a novel and important question. Under the *Bauman* rules, mandamus almost certainly would not be available to correct such a usurpation of or failure to exercise jurisdiction. That, of course, was precisely what the court of appeals held in this case.

The Ninth Circuit thus has established a rule contrary to *La Buy* and to the historical use of mandamus. Its decision in this case is a direct conflict with the views of the other circuits which have held that mandamus is the proper remedy where a district court improperly delegates its authority to a special master. *See, e.g., In re Bituminous Coal Operators Association, supra; in re United, States, supra; Prudential Insurance Company, supra.*

Certiorari should be granted both to resolve the conflicts among the circuits on the specific question of the availability of mandamus where a district court improperly delegates authority to a special master, and also to preserve the traditional function of mandamus jurisdiction, to restrict a district court to its jurisdiction or to compel it to act within its jurisdiction.

II. THIS PETITION PRESENTS THE QUINTESSENTIAL CASE OF A DISTRICT COURT'S ABDICATION OF ITS JUDICIAL ROLE TO A SPECIAL MASTER, IN VIOLATION OF ARTICLE III OF THE CONSTITUTION

A. A District Court May Not Delegate to a Master Its Responsibility to Hear and Decide Fundamental Issues of Liability.

Article III judges are given lifetime tenure, and a fixed irreducible compensation for their services "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government," *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982), as well as from the tides of public opinion and passion. Hamilton, *The Federalist Papers*, No. 78, p. 489 (H. Lodge ed. 1888). "The inexorable command of this provision is clear and definite. The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." *Northern Pipeline Const.* v. *Marathon Pipe Line Co.*, 458 U.S. at 58-59.

Accordingly, all efforts by Congress or the federal courts to transfer or delegate judicial authority to "judges" or officials not possessing the "attributes prescribed in Article III" must be closely circumscribed. To be sure, there are contexts where some portion of the judicial power constitutionally has been lodged in administrative agencies, magistrates, bankruptcy judges, and even special masters. But the federal courts have recognized that at least with respect to "private rights disputes," such as the instant case, which "lie at the core of the historically recognized judicial power," *Northern Pipeline*, 458 U.S. at 70, Article III courts must play the decisive role in the adjudicatory process.

Thus, for example, while administrative agencies may adjudicate "initial factual determinations" involving "the adjudication of congressionally created rights," *Northern Pipeline*, 458 U.S. at 78, the federal courts must retain and exercise "the essential attributes of the judicial power," *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932), including meaningful review of the factual record and *de novo* review of the law. *Id.* at 44-45, 48; *Northern Pipeline*, 458 U.S. at 78. And where the rights at stake are not exclusively of congressional derivation, or where Congress has granted original Article III jurisdiction over disputes concerning congressionally created rights, the power to encroach upon the exercise of traditional judicial functions by Article III courts is even less. *Id.* at 83-84.

In upholding the Federal Magistrates Act, 28 U.S.C. § 636(b), the Court emphasized that "[t]he authority—*and the responsibility*—to make an informed, final determination . . . remains with the judge," *United States* v. *Raddatz*, 447 U.S. 667, 682 (1980), who must exercise *de novo* review of all *facts* and law. Where Congress delegated such essential functions to non-Article III bankruptcy judges to adjudicate private rights disputes, the Court declared the scheme to be unconstitutional under Article III. *Northern Pipeline Const.* v. *Marathon Pipe Line Co.*, *supra*. The Court in *Northern Pipeline* emphasized the difference between the constitutional delegations of power

upheld in *Crowell* and *Raddatz* and the unconstitutional grant of power to non-Article III bankruptcy judges struck down in *Northern Pipeline*, 458 U.S. at 84-86.

The same distinctions emphasized in Northern Pipeline have long been applied to limit the extent to which federal courts may use special masters to determine matters committed to the Article III jurisdiction. Over a century ago, the Court described the historical limited role played by a master:

> A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it . . . The information which he may communicate by his findings in such cases . . . is merely advisory to the court which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence.

Kimberly v. *Arms*, 129 U.S. 512, 523 (1889). The Court warned that, in the absence of agreement by the parties:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him . . . [or] abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers.

Id., 129 U.S. at 524.

Rule 53, Federal Rules of Civil Procedure, reflects the concerns expressed in the *Kimberly* case. The Rule explicitly provides that reference to a master must be "the exception and not the rule," Rule 53(b). A master may be appointed to assist a jury in its fact finding "when the issues are complicated;" otherwise, a reference may be made only when "some exceptional condition requires it." *Id.* Considerations such as the complexity of a case and a crowded court docket do not constitute an "exceptional condition" which would justify appointment of a master:

> [C]ongestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception. Petitioner—[also] alleges that [reference to a master is justified where there exists] unusual complexity of issues of both fact and law. But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis . . . Nor does Petitioner's claim of the great length of time these trials will require offer exceptional grounds.

La Buy v. *Howes Leather Co.*, 352 U.S. 249, 258-59 (1957). *Accord, Burlington Northern Railroad Co.* v. *Department of Revenue*, 934 F.2d 1064, 1073 and n.5 (9th Cir. 1991) ("Indeed, it is almost impossible to justify the appointment of a master based only on `judicial efficiency'"); *In re United States*, 816 F.2d 1083 (6th Cir. 1987); *Stauble* v. *Warrob, Inc.*, 977 F.2d at 690, 694 (1st Cir. 1992); *Prudential Insurance Company* v. *United States Gypsum Company*, 991 F.2d 1080 (3rd Cir. 1993)

Even where an exceptional condition might justify referral to a master on collateral issues, there are certain core judicial functions which a federal court must reserve to itself. For example, it is not ordinarily proper to refer a case to a master for "determination of the legal sufficiency of the complaint," 5A James W. Moore, *Moore's Federal Practice*, ¶ 53.06, p. 53-77 (1992 ed.); for "[t]he handling of the preliminary motion practice," *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 361 (7th Cir. 1972); for determination of a motion for preliminary injunction, *Liptak* v. *United States*, 748 F.2d 1254 (8th Cir. 1984); or for decision of summary judgment motions, even in complex antitrust litigation, *Jack Walters and Sons, Corp.* v. *Morton Building, Inc.*, 737 F.2d 698, 712-3 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984).

More broadly, no condition, exceptional or otherwise, can justify referral to a master of the merits of a dispute:

> Because determining a fundamental question of liability goes beyond mere assistance and reaches the essential judicial function identified by Article III, Rule 53 does not allow the responsibility for making such judgments to be delegated to masters (or other persons not of Article III stature) in the face of a contemporaneous objection.

Stauble v. *Warrob*, 977 F.2d at 695. *Accord, In re Bituminous Coal Operators' Association, Inc.*, 949 F.2d 1165 (D.C. Cir. 1991) (the district judge must "reserve for himself, and not delegate to the special master, the core function of making dispositive rulings, including findings of fact and conclusions on issues of law"); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987) (granting mandamus because the district court's reference of potentially dispositive motions violated the litigants' "right to have the basic issues heard by the district judge"). Indeed, in *Burlington Northern R.R.* v. *Dept. of Revenue*, 934 F.2d at 1072, the Ninth Circuit itself reversed a judgment because of the district judge's "wholesale reference of the entire case to a master," and warned that "we can think of no circumstances to justify so extreme a delegation of judicial power as occurred here." *Id.* at 1073. *Cf., Jack Walters and Sons, Corp.* v. *Morton Building, Inc., supra.*

Even if it were possible to posit certain extraordinary circumstances which might justify initial referral of potentially dispositive motions and issues to a master for recommendations, the responsibility remains upon the district judge to carefully review the facts and law, and to render his own decision. The district court must "decide *de novo*, without deferring to a special master, all potentially dispositive questions of fact or law." *In re Bituminous Coal Operators Assn.*, 949 F.2d at 1169. The "mere 'laying on of hands' by a district judge who adopts a magistrate's or master's recommendation of liability *pro forma* cannot inoculate a proceeding against the pathology that invariably follows from noncompliance with Article III."

Stauble v. *Warrob*, 977 F.2d at 696. The district court "must respond to the particular facts of the case and address any objections to the recommendations made by the parties." 5A Moore, *Moore's Federal Practice*, ¶ 53.06, p. 53-76 (1992 ed.), citing *Kieffer* v. *Sears, Roebuck & Co.*, 873 F.2d 954 (6th Cir. 1989) (district court must hold hearing when party files objections to master's report); *Vekamaf Holland B.V.* v. *Pipe Benders, Inc.*, 671 F.2d 1185 (8th Cir. 1982) (district court must respond to facts of case and set forth its reasons).

The point was made most emphatically in the Ninth Circuit's decision in *Burlington Northern*. In reversing a district court judgment confirming the recommendations of a special master, the court found that:

> the district court acted as a "mere rubber stamp" for the findings and conclusions of the master. Although the court received memoranda from the parties, in its order it provided no substantive explanation for affirming.

934 F.2d at 1074. See also *id.* at 1072 ("the district court's 'rubber stamp' of the master's order is an inexcusable abdication of judicial responsibility and a violation of Article III of the Constitution"); *Stauble* v. *Warrob*, 977 F.2d at 697 ("The district court adopted the master's report without a hearing, without any stated analysis of the evidence, and without any discussion of the master's legal conclusions").

B. The District Court in this Case Improperly Delegated Authority to the Special Master to Hear and Consider Fundamental Determinations of Liability: Permitted the Special Master to Resolve Controverted Issues of Fact and Credibility on the Basis of Papers, Without a Hearing; and Consistently Rubber Stamped the Findings of Fact and Conclusions of the Special Master

"Like the bark of a dog to Sherlock Holmes, . . . the indicia of independent review are telling in this case by their absence."

Stauble v. *Warrob*, 977 F.2d at 696-697. Indeed, we have found no case in which a district court has so utterly and consistently abdicated its judicial role.

This pattern was manifest from the very beginning of the referral. As we have noted, prior to the transfer of this case directly to Judge Ideman, Judge Pfaelzer and the court of appeals had upheld the sufficiency of the RICO allegations in plaintiffs' complaint. See *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076, 1080 (9th Cir. 1986). Immediately upon receiving the case, Judge Ideman *sue sponte* referred the question of the sufficiency of the RICO allegations to the special master.[8] The special master then issued a "recommendation" rejecting the prior determinations of Judge Pfaelzer and calling for the dismissal of the RICO claims. Judge Ideman summarily rubber stamped this "recommendation" without holding oral argument or writing a word of analysis (12a). Thus, the special master not only decided a fundamental issue of liability under the case, but was permitted to overturn the prior decisions of an Article III district judge.

Throughout the litigation, Judge Ideman followed the same pattern of rubber stamping the "recommendations" of Special Master Kolts, without holding a hearing or oral argument and without delivering an opinion or explanation of his reasons for doing so. Of particular note are the following:

(1) The special master heard and made recommendations granting or denying the parties' motions for partial summary judgment or to dismiss causes of actions or some defendants. In each instance, the district court adopted the special master's report without a hearing, without oral argument, and without a written or oral opinion explaining his reasons, or analyzing the factual contentions and the applicable law (14a, 16a).

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[8] As we have seen, it is particularly inappropriate to refer a "determination of the legal sufficiency of the complaint," to a special master at all, 5A Moore, *Moore's Federal Practice*, ¶ 53.06, p. 53-77 (1992 ed.), let alone without subjecting the master's recommendation to searching review.

(2) The special master ordered the plaintiffs to produce discovery, over their objections that they did not possess or control such documents. In ordering such production, the special master rejected the plaintiffs' objections as being factually false, without holding a hearing to determine the facts or credibility of the plaintiffs' declarants, or the opposing declarants of the defendants. The district court adopted the master's production orders, without hearing or oral argument (23a, 25a).

(3) The special master based his decisions to impose issue oriented sanctions, to dismiss plaintiffs' complaint, and to impose attorneys fees against plaintiffs in major part on his previous discovery and sanctions orders which were never reviewed on their merits by the district court. The district court rotely and without comment or indicia of independent analysis approved these decisions, thereby giving preclusive effect to the special master's unreviewed earlier orders.

(4) Finally, the sanctions orders themselves, which dismissed all of plaintiffs' claims with prejudice and imposed $2.9 million in attorneys fees against plaintiffs, were routinely rubber stamped by the district judge (18a, 28a). No evidentiary hearings on disputed issues of fact were held by either the special master or the district judge. The district judge refused to hear oral argument on any issue, and failed to write a single word of analysis of either the facts or the law underlying the motions. Indeed the special master's initial sanctions order imposing "issues" sanctions was never reviewed by the district judge, although it served as the predicate for all subsequent discovery and sanctions orders.

Even more so than in the *Burlington Northern* case, this record constitutes "an inexcusable abdication of judicial responsibility and a violation of Article III of the Constitution." *Burlington Northern*, 934 F.2d at 1072. *See also, Stauble* v. *Warrob*, 977 F.2d at 697.

This case, and recent similar cases such as *Burlington Northern, Stauble, In re Bituminous Coal, In re United States*, and

Prudential Insurance, demonstrate a disturbing tendency among district court judges to grant broad powers to special masters, without subjecting the actions of the special masters to proper scrutiny. The time is appropriate for this Court to provide nationwide guidance in this troubled area, both assuring that the mandate of Article III is met and removing a source of increasing litigation in the courts of appeals. While this Court should insure that mandamus review is available to correct judicial abdication of Article III powers, elucidation of the standards governing appointment and review of special masters will render such mandamus review unnecessary in most cases.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed July 7, 1993
No. 93-70281
DC# CV-85-711-JMI
Central California (Los Angeles)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

—and—

DAVID MAYO, et al.,

Real-Parties-in-Interest.

Before:

TANG, POOLE and NORRIS,

Circuit Judges.

ORDER

Petitioners' motion for leave to file a reply in support of the petition is granted. The reply shall be filed as of the date received.

The petition for a writ of mandamus is denied. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed September 13, 1989
Case No. CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

ROBIN SCOTT, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER APPOINTING SPECIAL MASTER

IT IS HEREBY ORDERED:

The above-captioned consolidated cases consist of a complex litigation concerning RICO, Federal Trademark and Service Mark Infringement, the Sherman Act, the Cartwright

Act and various pendent state claims as well as numerous counterclaims. Due to the complexity of these actions and numerosity of the parties, there have been as many as seven significant motions and six discovery motions pending simultaneously. There have been over 100 depositions and over 90 volumes of court files generated during the four year period of litigation. The parties have filed a very large number of motions, motions for reconsideration and appeals. Motions continue to be made and rulings appear to spawn an ever-greater number of motions. The Court is overburdened with voluminous briefs filed on these various matters. The Court finds itself having to devote a disproportionate amount of time and resources to this case to the detriment of other litigants whose matters are pending before the Court. The Court's resources are finite. Four years into the case, discovery motions continue to pour in; six new discovery motions are presently pending before the Magistrate. These cases have taken a substantial portion of the working time of the District Judge, two magistrates and several law clerks. These cases will continue to dominate the Court's calendar and time and the Court will be devoting a disproportionate and unreasonable share of time and resources to the resolution of these actions.

Also, this lawsuit threatens to become a massive undertaking due to the complexity of issues, great number of witnesses, the estimated trial days and the litigiousness of the parties. The parties estimate the trial to take three months. This trial could thereby require approximately one-third of the Court's trial days for an entire year. Clearly, the Court cannot afford to spend this amount of time on a single trial, without making a serious effort to reduce the trial time. Moreover, this trial would have to be recessed from time to time for priority criminal cases. This case has been pending since 1985 and could be dragged out for over an additional year or longer. Therefore, it is urgent to get the trial estimate down to a reasonable figure.

The Court may properly refer all issues to a Special Master for a hearing and report where potentially substantial economic concerns are involved and where an expeditious reso-

lution of difficult issues is required. *Helene Curtis v. Sales Affiliates*, 199 F.2d 732, 733 (2d Cir. 1952). A trial court may issue an order of reference to a special master *sua sponte*. *In re Josylin's Estate*, 171 F.2d 159, 164 (7th Cir. 1948). The Court is not required to conduct an evidentiary hearing in order to determine whether a Special Master should be appointed. *Gary W. v. Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979). In light of the overburdened calendar of this Court and the time-consuming nature of this case, this Court finds that an exceptional condition exists requiring that certain matters be held under the supervision of a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The Honorable James G. Kolts, Judge of the Los Angeles Superior Court, Retired, be and hereby is appointed as Special Master herein.

2. The Court considers Judge Kolts to be specially qualified to serve in this capacity for the following reasons:

(a) Judge Kolts has had over twenty years of extensive litigation experience as a judge of the Los Angeles Superior Court. Judge Kolts was appointed Judge of the Los Angeles Superior Court in 1969 and was the supervising judge of the criminal division in 1972 and 1973. From 1974 until 1983, Judge Kolts was a civil trial judge handling jury and nonjury cases.

(b) Judge Kolts' previous court service included law and motion, writs and receivers, family law and extensive civil and criminal trial work.

(c) Between 1984 and 1989, Judge Kolts had four three-month assignments to the California Appellate Court, Second District Court of Appeal.

3. Accordingly, the trial court may refer to the Special Master any and all issues arising in an action to which Rule 53 is applicable, whether pertaining to procedural matters or to matters going to the merits. *Chicago, Milwaukee & St. Paul*

Ry. v. Tompkins, 176 U.S. 167 167 (1900); *Faucher v. Lopez*, 411 F.2d 992 (9th Cir. 1969).

The Special Master is empowered and charged with the duty to:

a) *Recommend methods which will expedite litigation, including but not limited to:*

(1) Identifying areas where partial summary judgment would be appropriate;

(2) Obtaining stipulations to uncontroverted facts;

(3) Examining contested issues of fact to ensure that they are in fact contested;

(4) Isolating contested issues of law and making recommendations as to how these disputes should be resolved;

(5) Identifying any matters which could be dealt with by motions in limine and suggesting resolutions of these matters;

(6) Determining which witness testimony appears to be cumulative. Counsel shall prepare for the Special Master's approval a summary of the expected testimony of each witness to help the Special Master identify any cumulative or inadmissible testimony;

(7) Making recommendations on all contested exhibits and testimony. Counsel shall organize their exhibits and witness lists and make the appropriate objections thereto, so as to aid the Special Master in this task;

(8) Obtain stipulations in appropriate circumstances where facts are not in dispute.

b) *To preside over all pretrial matters.*

The Special Master may place the hearings on the record. The Special Master may require the production of evidence on all matters of the case, including the production of all books, papers, vouchers, documents and writings. The Special Master has the authority to subpoena witnesses and call the parties to the action. The Special Master has the authority to put wit-

nesses and parties under oath and may himself examine them. The Special Master may rule on the admissibility of evidence. When a party so requests, the Special Master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury. The Special Master has the authority to supervise and issue recommendations regarding all pretrial matters. The Court will independently review the Special Master's recommendation and the Court may adopt, modify, reject or recommit the recommendation with instructions. Regarding the Special Master's recommended findings of fact and conclusions of law, any party may file objections, responses or comments within ten (10) days of the date of filing of the recommendation. The Court will independently review the Special Master's proposed findings of fact and conclusions of law, and after a hearing the Court may adopt the report or modify it, reject it in whole or in part, may receive further evidence or recommit the report with instructions.

Before filing his report with the Court, the Special Master may submit a draft hereof to counsel of all parties for the purpose of receiving suggestions. The Special Master shall exercise the power to regulate all proceedings in every hearing before him and may do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order. Due to the large numbers of parties involved, if a party fails to appear at a previously scheduled conference or hearing, the Special Master may proceed ex parte or, in his discretion, adjourn and continue the proceeding. The Special Master is directed to make periodic reports to the Court concerning the progress of this litigation.

Any questions or disputes concerning the scope of the Master's authority shall be resolved by motion to the Court.

c) *Superintend and schedule all discovery matters, including the taking of depositions, and to decide all questions and disputes with reference thereto, including the power to determine the scope of discovery, to issue protective orders, to determine whether discovery orders have been complied with,*

and to supervise and order the production and copying of documents and/or records, all in such manner as the Special Master considers will protect the rights of the parties. The Special Master may make recommendations as to whether further discovery should be permitted as well as the scope and duration of discovery.

d) *As to the taking of depositions, the Special Master may fix the time and place thereof, and he shall have the power:*

1) to rule upon the form of any question addressed to a witness;

2) to rule in the first instance on any objection to any question made by or on behalf of any party or a witness, and upon upholding any such objection to disallow the question;

3) to rule in the first instance that answers to any such questions objected to by any party may be taken subject to such objection and preserved until the admissibility of said testimony is determined by the Federal Court litigation before this Court in this Action;

4) to rule in the first instance upon any objection to any question made on the ground that the answer to such question might cause the disclosure of a confidential communication between attorney and client, work product, or any other matter allegedly otherwise protected from disclosure;

5) to rule in the first instance upon all applications made during or in connection with the said depositions under Rules 26, 30, 31, 32 and 34 of the Federal Rules of Civil Procedure;

6) to rule in the first instance on the use at the depositions of any matter produced in discovery under Rule 34 or otherwise;

7) to modify or revoke any Court Order heretofore made and entered limiting discovery, or pertaining to, or related to any discovery problem, including scheduling and including pretrial and pretrial orders and pretrial hearings and all other matters, other than this Order.

e) *Other duties as assigned.*

The above enumeration of powers is not intended as denying to the Special Master any power which is not specifically mentioned. To the contrary, the Special Master shall have, enjoy and exercise all powers allowed to Special Masters under Rule 53 of the Federal Rules of Civil Procedure and all powers necessary and proper to effectuate Rules 26 through 37, and Rule 45(a)-(d) of the Federal Rules of Civil Procedure (popularly called the discovery rules), subject to review as hereinafter provided.

3. Any action taken or ruling made by the Special Master in discovery matters shall be subject to review by this Court upon the application of any party aggrieved by such action or ruling, provided only that such application be made within ten (10) days after the action or ruling of the Special Master of which complaint is made, unless such time shall have been enlarged by the Master for good cause shown.

a) The party seeking review shall, at his, her, or its own expense, provide to the Court a transcript of the proceedings before the Master, if a court reporter was present thereat, together with a concise statement of the issues and contentions with respect thereto and points and authorities.

b) On any matter brought to the Court for review, the Special Master shall furnish to the Court a statement of the problem and the reasons for his action which statement may include the legal basis for his action.

c) When review is sought as to a matter arising in a deposition, the Special Master may in his discretion order completion of the deposition pending review.

d) The Court following independent review of the action taken, or ruling made by the Special Master may adopt, modify, reject or recommit it with instructions.

4. The compensation to be allowed the Special Master for his services shall be fixed by the Court upon motion of the Special Master and shall be paid from time to time as the

Court shall determine. The Special Master's out-of-pocket expenses and administrative expenses, such as court reporter, clerical assistance, research assistance, travel and subsistence, and data processing shall be similarly paid. Within thirty (30) days of the filing of this Order, plaintiffs and defendants shall deposit with the Court an initial sum of $50,000; that is $25,000 from plaintiffs jointly and $25,000 from the defendants jointly. This sum shall serve as an initial fund for this purpose. Said deposit shall be made with the Clerk of the Court, to be deposited in the Registry of the Court in an interest-bearing account to be drawn upon by order of Court, following approval of the request of the Special Master.

The apportionment of the deposit among the parties on each side shall be by agreement among themselves. In the event the parties are unable to agree upon an allocation between and among themselves, any party may move the Court to fix the allocation.

Regardless of the ratio in which deposits are made, the Court may, at the end of the case, assess the compensation and expenses so allowed to the Special Master between the parties as the court shall determine, taxable as costs in this action.

When, in the Special Master's opinion, the services rendered and expenses incurred are sufficient to substantially utilize or exceed the amount of said initial deposit, the Special Master shall advise the Court thereof, and the Court will order additional deposits.

5. One chamber's copy of all documents filed in this action shall be furnished to the care of The Honorable James G. Kolts, 1715 East Altadena Dr., Altadena, California 91001. Said copy shall be clearly marked "Courtesy Copy for the Special Master" and shall be mailed under separate cover from the original and copy of the documents to be filed with the Clerk's Office of the United States District Court, no later than the date of the filing of such papers with the Clerk. A copy of any application for review and of any papers or memoranda in support of or in opposition thereto shall similarly be furnished to the Special Master.

6. The parties shall have ten days within which to object in writing to this Order appointing the Special Master.

IT IS SO ORDERED.

DATED: Sept. 12, 1989

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed May 4, 1990
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER,
a California Corporation, et al.,

Plaintiffs,

—v.—

ROBIN SCOTT, an individual, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER,
a California Corporation, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, an individual, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF SPECIAL MASTER RE RICO AND PENDENT CLAIMS

IT IS HEREBY ORDERED:

1. The Court has reviewed the Reports and Recommendations of the Special Master re Rico and Pendent claims, as

well as the parties' objections to these Reports and Recommendations.

2. The Court hereby adopts the Reports and Recommendations of the Special Master re Rico claims and Pendent claims.

IT IS SO ORDERED.

DATED: May 2, 1990

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed December 2, 1992
CV-85-711; 85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF THE SPECIAL MASTER'S ORDER OF SEPTEMBER 10, 1992 AS TO SUMMARY JUDGMENT MOTION RE: EMOTIONAL DISTRESS

IT IS HEREBY ORDERED:

The motion of plaintiffs Religious Technology Center, *et al.*, for review of Special Master Kolts' Order of 9/10/92 was decided without hearing on November 9, 1992.

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law, the Court has concluded that plaintiffs' motion is not grounded in facts or warranted by existing law. Accordingly, plaintiffs' motion is hereby DENIED.

IT IS SO ORDERED.

DATED: December 1, 1992

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed January 12, 1993
CV-85-711; 85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF SPECIAL MASTER'S ORDER OF 11/13/92

IT IS HEREBY ORDERED:

1. Having read and considered plaintiffs' motion for review of the Special Master's Order of November 13, 1992 as to Summary Judgment re: libel, defendants' opposition to said motion, and all papers filed in connection thereto, the Court

concludes that such motion is neither grounded in fact nor warranted by law.

The Court finds that triable issues of material exist, as determined by both Special Master Kolts and Judge Pfaelzer, and that summary judgment is improper on the libel counterclaim.

Accordingly, plaintiffs' motion for review of the Special Master's November 13, 1992 Order is HEREBY DENIED.

Defendants' request for sanctions is HEREBY DENIED.

IT IS SO ORDERED.

DATED: January 11, 1993

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed July 30, 1992
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ADOPTING SPECIAL MASTER KOLTS' ORDER RECOMMENDING DISMISSAL OF PLAINTIFFS' AMENDED COMPLAINTS

IT IS HEREBY ORDERED:

On April 20, 1992, Special Master James G. Kolts filed a Memorandum Opinion in the above-entitled action granting Defendants' motion to dismiss the amended complaints. The

Court construed that Opinion as a recommendation and by Order filed on April 28, 1992, the Court Ordered the parties to show cause why the Court should not adopt Special Master Kolts' Order recommending the dismissal of Plaintiffs' amended complaints.

Having read and considered Plaintiffs' response to the Order to Show Cause, Defendants' opposition thereto, Plaintiffs' Reply in Support of Plaintiffs' Response, and all supporting documents filed therewith, the Court hereby finds that as per the reasons set forth in the Special Master's Memorandum Opinion, a dismissal of the amended complaints is the "only remaining meaningful remedy" for Plaintiffs' misconduct with respect to discovery in this action. Therefore, the Court hereby ADOPTS the Special Master's Memorandum Opinion of April 20, 1992 and DISMISSES Plaintiffs' amended complaints.

IT IS SO ORDERED.

DATED: July 30, 1992

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed August 28, 1992
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

ORDER RULING ON ALL PENDING MOTIONS UNDER SUBMISSION

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF SPECIAL MASTER'S ORDER OF JUNE 2, 1992

ORDER DENYING PLAINTIFFS' MOTION TO VACATE SPECIAL MASTER'S ORDER OF APRIL 26, 1991 AS TO JOHN NELSON, HARVEY HABER, DIANA REISDORF AND VIVIEN HARTOG ZEGEL

IT IS HEREBY ORDERED:

By Order entered on July 31, 1992, the Court adopted Special Master Kolts' Order recommending dismissal of Plaintiffs' Amended Complaints in this action. The Court has reviewed the remaining motions which are under submission in the above-entitled action. The Court has determined that the following motions have been rendered MOOT by the dismissal of the First Amended Complaints:

1) Plaintiffs' motion for review of Special Master's Order denying Plaintiffs' motion for partial summary adjudication of issues and specification without substantial controversy on issues concerning authorship and origin of religious scripture and for entry of judgment.

2) Defendants' motion for review of Memorandum Opinion and Order of Special Master dated June 4, 1991 granting Plaintiffs' motion for partial summary judgment concerning authorship and origin of scriptures pursuant to the Copyright Act.

3) Plaintiffs' motion for review of the Special Master's Orders of April 26, 1991 on Defendants' motion to dismiss copyright cause of action and on Order denying Plaintiffs' motion for reconsideration of April 26, 1991 Order and Ordering Rule 11 sanctions.

4) Plaintiffs' motion for review of Special Master's Memorandum Opinion and Order of August 20, 1991 dismissing breach of contract cause of action.

5) Counterdefendant's motion for reconsideration of Court's Order of August 12, 1991 and request for stay.

6) Plaintiffs' Notice of Application and Application for evidentiary hearing for assessment of damages by Court and for entry of judgment by default.

7) Plaintiffs' Renewed Application for evidentiary hearing for assessment of damages by Court and for default judgment.

As to Plaintiffs' motion for review of the Special Master's Order of June 2, 1992, the Court, having read and considered Plaintiffs' motion, Defendants' Opposition thereto, Plaintiffs' Reply and all supporting documents submitted therewith hereby DENIES Plaintiffs' motion.

Finally, Plaintiffs' motion to vacate the Special Master's Order of April 26, 1991 as to John Nelson, Harvey Haber, et al. is hereby DENIED WITHOUT PREJUDICE. That motion deals with issues which are still being considered by the Special Master. As such, the motion is premature and may be refiled when the Special Master has made final rulings.

IT IS SO ORDERED.

DATED: August 28, 1992

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed May 7, 1990
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, an individual, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, an individual, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ADOPTING SPECIAL MASTER'S APRIL 3, 1990 DISCOVERY ORDER

IT IS HEREBY ORDERED:

The Court hereby adopts the Special Master's April 3, 1990 discovery order. The Court finds that the Special Master's discovery order is not burdensome or improper because the

Special Master only directs plaintiffs and Mr. Norman Starkey ("Starkey") to respond to defendants' discovery requests to the extent plaintiffs and Mr. Starkey have custody or control over the documents requested. Moreover, if plaintiffs and Mr. Starkey have already complied with defendants' discovery requests, plaintiffs and Mr. Starkey are in compliance with the Special Master's discovery order.

IT IS SO ORDERED.

DATED: April 27, 1990

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed August 13, 1991
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER DENYING PLAINTIFFS' MOTION FOR STAY

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF THE SPECIAL MASTER'S DISCOVERY ORDER DATED 7/25/90

IT IS HEREBY ORDERED:

1. Plaintiffs RELIGIOUS TECHNOLOGY CENTER, et al.'s (hereinafter "Plaintiffs") motion for a stay and suspension of

discovery and a stay of the objections to the Special Master's Discovery Order pending adjudication of motions for partial summary judgment is hereby DENIED.

2. Plaintiffs' motion for review of the Special Master's Discovery Order dated 7/25/90 is hereby DENIED.

3. Plaintiffs contend that discovery on the antitrust and authorship issues should be stayed and suspended until the summary judgment motions addressing the claims and defenses regarding those issues are resolved. They argue that discovery on those issues has been extensive and intrusive and promises to continue to be so. Plaintiffs assert that compliance with discovery requests and discovery orders regarding those issues now would be wasteful if summary judgment motions are granted and they claim that if the summary judgment motions are denied, the delay a stay would occasion would be minimal and discovery could continue from that point.

4. As to the motion for review of the Special Master's Order, Plaintiffs contend that Defendants have failed to demonstrate that the documents sought are relevant, that Defendants cannot get financial discovery for punitive damage claims, that Plaintiffs' financial records are specifically protected by California law, and that the Special Master's Order which permits discovery of financial records because of their alleged relevancy to Defendant's antitrust claims is not supported by fact or law.

In the present case, Plaintiffs have been extremely evasive with respect to their discovery obligations. This appears to be yet another tactic utilized by Plaintiffs to delay the progress of this case which was first filed in 1985. Moreover, Plaintiffs are already in violation of several Court Orders which have directed that Plaintiffs respond to Defendants' pending discovery requests. In fact, discovery responses by Plaintiffs in this case have either been incomplete or inadequate. In light of the foregoing, the Court hereby DENIES Plaintiffs' motion for a stay and the Court also hereby DENIES Plaintiffs' application for review of the Special Master's Discovery Order dated 7/25/90 and

hereby ORDERS the parties to comply with the discovery ordered by the Special Master.

IT IS SO ORDERED.

DATED: August 12, 1991

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed February 24, 1993
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiffs,

—v.—

ROBIN SCOTT, an individual, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, an individual, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER GRANTING ATTORNEYS' FEES [~~PROPOSED~~]

DATE: March 1, 1993
TIME: To be submitted
CTRM: HON. JAMES M. IDEMAN

IT IS HEREBY ORDERED, as follows:

On July 31, 1992 the Court issued an order adopting the recommendation of the Special Master and dismissed Plaintiffs' Amended Complaints in these two consolidated actions. On August 31, 1992 Defendants filed a motion as the prevailing parties seeking attorneys' fees from Plaintiffs pursuant to 15 U.S.C. § 1117 (the Lanham Act); 17 U.S.C. § 505 (the Copyright Act), a written contract, dated January 27, 1982, (*see, e.g., Jones v. Drain*, 149 Cal.App.3d 484, 489, 196 Cal.Rptr. 827 (1983)) and as a result of Plaintiffs' misconduct in filing and prosecuting these actions in bad faith (*see, e.g., Chambers v. Nasco*, ___ U.S. ___, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

The Court has reviewed the Recommendation and Proposed Order of the Special Master to whom Defendants' Motion for Attorneys' Fees was referred in the first instance. For the reasons set forth herein, the Court adopts the Recommendation of the Special Master.

The Court reviewed the extensive documented record before it, including Plaintiffs' stated policy of using litigation as a weapon, the application of the Plaintiffs' "Fair Game" policy toward Defendants in this case, the Plaintiffs' objective of trying to obtain an unfair commercial advantage over Defendants by engaging them in litigation rather than allowing them to compete, Plaintiffs' document destruction and concealment, Plaintiff's refusal to comply with multiple court orders, which non-compliance was determined to be as a result of bad faith, willfulness or fault of the party, and the needless delay and multiplication of proceedings (covering over seven and one-half years) spawned by Plaintiffs' discovery stonewalling, the filing of frivolous motions, the filing of offensive and unreasonable motions and innumerable requests for interlocutory appeals. In addition, the Court notes a pattern of conduct by Plaintiffs which required the imposition of both non-monetary and monetary sanctions. As a result, the Court concludes that not only should Plaintiffs' be assessed attorney's fees for their bad faith litigation conduct, but also, these cases satisfy the requirement of the Lanham Act which permits the recovery of attorneys' fees in "exceptional cases", *Academy of Motion Picture Arts and*

Sciences v. Creative House Promotions, Inc., 944 F.2d 1446 (9th Cir. 1991), and of the Copyright Act, which in this Circuit has been construed to permit the recovery of attorneys' fees where there is a finding of "bad faith or frivolity" on the part of a plaintiff, *Cooling Systems and Flexibles v. Stuart Radiation*, 777 F.2d 485 (9th Cir. 1985). The Court also concludes that under California Law (see, Civil Code § 1717) Defendants are entitled to an award of attorneys' fees as the prevailing parties pursuant to contract.

The Court also has reviewed the declarations and exhibits submitted in support of Defendants' Motion (found by the Special Master to be complete, accurate, extensive and convincing) in order to determine the reasonableness of the attorneys' fees requested as required by *Hensley v. Eckerhart*, 461 U.S. 242, 103 S.Ct. 1922, 76 L.Ed.2d 40 (1983) and in so doing adopts the lodestar approach utilized by the Ninth Circuit. *See, e.g., Kim v. Fujikawa*, 871 F.2d 1427, 1434–1435 (9th Cir. 1989).

Defendants submitted detailed evidence based upon contemporaneously prepared time records of their attorneys substantiating 22,885.71 hours of billed time over a period of seven and one-half years at a value of $2,867,371.81. In addition, Defendants provided detailed reconstructed records for a limited number of records which had been lost for an additional 270 hours with a value of $28,399.01. Defendants properly redacted and did not bill for time and values for counter-claims.

The Court considered the novelty and complexity of the issues in these consolidated cases. As framed by Plaintiffs, these cases involved wide ranging federal (e.g., RICO, Lanham and Copyright) and pendent state (e.g., breach of contract, trade secret and other tort theory) causes of action. These cases involved multiple requests for injunctive relief, several published opinions from both the Ninth Circuit Court of Appeals and the District Court, including a decision of first impression in the Ninth Circuit upholding Defendants' contention that injunctive relief was not available to a private litigant in a RICO action.

The complexity and volume of issues raised in these proceedings, in part reflected by a court file well in excess of 100 volumes, imposed a demand upon the Court which was further aggravated by Plaintiffs' litigation misconduct. As a result, it was necessary to appoint a Special Master to oversee pre-trial activity in these cases.

The Court finds that Defendants were represented by able counsel who conducted the defense of this case in a reasonable manner taking into account both the size and scope of the litigation as well as the bad faith litigation practices employed by Plaintiffs. Defendants' counsel initially were confronted with demands for over $2.0 million, plus punitive damages and permanent injunctive relief, yet secured for Defendants a dismissal of all of Plaintiffs' claims in their entirety.

Taking into account the time and labor required, the novelty and complexity of the issues, the skill and expertise of counsel, the amounts involved and the result obtained, the Court concludes that the hourly fees charged (the record reflects that Defendants' primary counsel charged lower rates than Plaintiffs' primary counsel for work on this case) and the total amount of time incurred were reasonable. Accordingly, the Special Master's Recommendations are hereby adopted, Defendants' Motion is GRANTED and the Court awards to Defendants' attorneys' fees incurred in the defense of these consolidated matters in the amount of $2, 895, 710.82.

IT IS SO ORDERED.

DATED: February 24, 1991

/s/ JAMES M. IDEMAN
Hon. James M. Ideman
United States District Judge

Submitted By:

LAW OFFICES OF JEROLD FAGELBAUM
BRIGHT & POWELL

BY: JEROLD FAGELBAUM
Jerold Fagelbaum
Attorneys For Defendants DAVID MAYO, CHURCH OF THE NEW CIVILIZATION, JOHN NELSON, HARVEY HABER, VIVIEN ZEGEL AND DEDE REISDORF

No. 93-558

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
DEC - 3 1993
OFFICE OF THE CLERK

RELIGIOUS TECHNOLOGY CENTER,
CHURCH OF SCIENTOLOGY INTERNATIONAL,
AND CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

vs.

DAVID MAYO, ADVANCED ABILITY CENTER, ROBIN SCOTT,
ADRIENNE SCOTT, RON LAWLEY, MORAG BELLMAINE,
STEVEN BISBEY, ADVANCED ABILITY CENTER
CANDA CRAIG, ADVANCED ABILITY CENTER EAST GRINSTEAD,
CHURCH OF THE NEW CIVILIZATION, HARVEY HABER,
JOHN NELSON, JON ZEGEL, VIVIAN ZEGEL,
Real Parties In Interest.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 3, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the court of appeals properly conclude that Petitioners had failed to establish the existence of extraordinary circumstances warranting appellate interference with the district court's case management by means of the invocation of mandamus jurisdiction?

2. Did the court of appeals properly conclude that the district court's limited referral of discovery and pre-trial matters to a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure, while reserving to the district court ultimate authority on all such matters, was not clearly erroneous?

RULE 29.1 LIST

Real Parties In Interest herein have no parent companies, subsidiaries or affiliates to list pursuant to S.Ct. Rule 29.1.

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No. 93-558

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

RELIGIOUS TECHNOLOGY CENTER,
CHURCH OF SCIENTOLOGY INTERNATIONAL,
AND CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

vs.

DAVID MAYO, ADVANCED ABILITY CENTER, ROBIN SCOTT,
ADRIENNE SCOTT, RON LAWLEY, MORAG BELLMAINE,
STEVEN BISBEY, ADVANCED ABILITY CENTER
CANDA CRAIG, ADVANCED ABILITY CENTER
EAST GRINSTEAD,
CHURCH OF THE NEW CIVILIZATION, HARVEY HABER,
JOHN NELSON, JON ZEGEL, VIVIAN ZEGEL,
Real Parties In Interest.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Real Parties In Interest, David Mayo, Church of the New Civilization, Harvey Haber, John Nelson, Vivian Zegel and Dede Reisdorf oppose the petition for writ of certiorari to review the

judgment of the United States Court of Appeals for the Ninth Circuit filed by the Petitioners herein.[1]

OPINIONS BELOW

The order of the court of appeals denying the petition for writ of mandamus is unreported. The order of the district court appointing a special master is unreported. Both orders are attached in the appendix to the Petition filed herein at (1a) and (3a), respectively.

JURISDICTION

The order of the court of appeals was filed on July 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Article III, § 1 of the Constitution of the United States provides:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

28 U.S. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rules of Civil Procedure

Rule 53. Masters

> (a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein.

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[1]Parties to consolidated cases *Religious Technology Center, Inc., et al. v. Robin Scott, et al.*, No. CV 85-711(AWT), and *Religious Technology Center et al., v. Wollersheim, et al.*, No. CV 85-7197 (AWT).

* * *

(b) Reference. A reference to a master shall be the exception not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. * * *

STATEMENT OF THE CASE

Real Parties In Interest, David Mayo and Church of the New Civilization (hereinafter referred to as "Party Respondents"), hereby submit their Response to the Petition for Writ of Certiorari filed on behalf of Religious Technology Center, Church of Scientology International and Church of Scientology of California.

This is not the first time Petitioners have challenged the reference to the Special Master in this case. On June 27, 1990, the court of appeals *denied* a similar petition for writ of mandamus. At that time, in response to a request from the appellate court, the district court filed a declaration to provide the reasons behind the reference. In prophetic fashion, the district court then noted that both the prior district court judge and the magistrate previously assigned to the case had:

> "... told me that essentially similar matters were pursued repeatedly but always with a somewhat different twist that required the expenditure of more judicial time, and, like cutting off the head of a hydra, each judicial decision seemed to span a half dozen spin-off disputes."

(Declaration of the Hon. James M. Ideman, 5/16/90, at ¶ 2) (1a). True to form, this Petition is a re-hash of arguments repeatedly rejected in the past.

In their Petition, Petitioners seek to mask the fact that in connection with the *limited* discovery and pre-trial reference to the Special Master, the district court has remained faithful to the teachings of this Court, and reserved *to itself*, at the trial level, the

ultimate judicial decision making power in this case. Further, Petitioners' argument, that in the exercise of such review authority the district court's orders are concise and to the point, is at once a testament to the detailed underlying memoranda decisions and recommended orders issued by the Special Master (a distinguished jurist with over 20 years experience as a state court judge) as well as the vacuous nature of many of Petitioners' motions for review which were filed automatically after every ostensibly adverse decision of the Special Master.

Petitioners' "abdication of judicial authority" argument is nothing more than a code phrase for their real argument that the decisions which were rendered adverse to them were the product of judicial bias or prejudice. However, that argument has been rejected time and again *on the merits* by each jurist who has had the opportunity to hear it in this case.[2] Moreover, it is untrue.[3]

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[2]Petitioners' *first* recusal motion was denied by the Hon. Terry J. Hatter, Jr. on 7/9/90. Petitioners' *second* recusal motion (seeking disqualification of both the district court and the Special Master) was denied by the Hon. J. Spencer Letts on 11/22/91. A Petition for Writ of Mandamus was denied by the Ninth Circuit court of appeals on 12/4/91, and a Petition for Writ of Certiorari was denied by this Court on 5/26/92. A *third* motion for recusal was denied by Judge Letts on 11/6/92 and sanctions of $6,400 were imposed. A *fourth* recusal motion was denied by Judge Letts on 2/17/93. It was in connection with Petitioners' *fifth* attempt to recuse Judge Ideman that Petitioners filed their Writ of Mandamus with the Ninth Circuit Court of Appeals currently under challenge. However, it was Petitioners' harassment of Judge Ideman's former law clerk which prompted him to recuse himself from this case. Since then, this case has been re-assigned to the Hon. A. Wallace Tashima for trial.

[3]Although it is not discernible from the Petition, befitting their neutrality both the Special Master and the district court also have rendered decisions in this case adverse to Party Respondents. Thus, for example, concurrently with many of the orders of which Petitioners now complain, the district court also dismissed Real Parties In Interest's RICO and antitrust claims, and issued other rulings as requested by Petitioners.

The Petition represents only the latest example of how issues raised in this case by Petitioners have been argued and re-argued, slightly altered and argued again. It is one of the reasons that there exists an exceptional condition in this case warranting the additional attention a special master can offer so that in conjunction with the district court this case can be reduced to its essence and tried by the district court before a jury. The district court has not abdicated its responsibilities, the Petitioners have abused the adversarial and adjudicative process.

As a result, the Petition before this Court is not about judicial abdication of responsibility, but rather, it is about the district court's response to extraordinary demands which had been placed upon it by Petitioners and their abusive litigation policies.[4] In

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[4]Petitioners' strategy is to use the judicial system as a weapon against their perceived enemies:

> *Fair Game:* "Enemy — SP Order. Fair Game. May be deprived of property or ignored by any means by an Scientologist without discipline of the Scientologist. May be tricked, sued or lied to or destroyed." (HCOPL 10/18/67 Issue IV).
>
> *Predatory Use of Litigation:* "The purpose of the suit is to harass and discourage rather than to win. The law can be used very easily to harass, and enough harassment on somebody who is already on the thin edge anyway, well-knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly" (Magazine Article On Level 0 Checksheet, by L. Ron Hubbard at 55).

The "Fair Game" doctrine, is a reprehensible practice judicially recognized as such:

> " 'Fair Game' like the 'inquisition' targeted 'heretics' who threatened the dogma and institutional integrity of the mother church. Once 'proven' to be a 'heretic', an individual was to be neutralized. In medieval times neutralization often meant incarceration, torture and death. As described in the evidence of this trial the 'fair game' policy neutralized the 'heretic' by stripping this person of his or her economic, political and psychological power. (Internal citations omitted).

* * *

response to a complex, consolidated case which as of the date of the referral order had been pending for four and one half years, involved multiple party plaintiffs and defendants, counter-claims and counter-defendants, and which had been stalled by Petitioners' discovery recalcitrance and needless multiplication of proceedings, the district court ordered a limited referral of discovery and pre-trial matters to a special master so that the case could be more actively supervised and managed. Three and one half years later Petitioners' amended complaints have been dismissed, and the recovery of attorneys fees was awarded to Party Respondents as a direct result of Petitioners' flagrant violation of court orders and protracted discovery misconduct. (Dist. Ct's. Order Granting Attys' Fees, 2/24/93) (attached at (28a) to the Petition).

When Petitioners initially challenged the reference before the court of appeals, not only did Judge Ideman file a response supporting the reference, but also, he was joined by both the district court judge who previously had presided over the case (the Hon. Mariana Pfaelzer) and the magistrate who previously had been assigned discovery matters (the Hon. Volney V. Brown, Jr.), as well as by the Special Master (the Hon. James G. Kolts) (1a-16a).[5]

> We are not certain a deliberate campaign to financially ruin a former member or the dishonoring of debts owed that member qualify as 'religious practices' of Scientology. But if they do, we have no problem concluding the state has a compelling secular interest in discouraging these practices. Accordingly, we hold the freedom of religion guarantee of the United States and California Constitutions do not immunize these practices from civil liability for any injuries they cause to 'targets' such as Wollersheim."

Wollersheim v. Church of Scientology, 212 Cal.App.3d 872, 88-889, 891 280 Cal.Rptr. 331 (1989), *modified*, 15 Cal.App.4th 1426, 6 Cal.Rptr.2d 532 (1992), *review granted*, 10 Cal.Rptr.2d 182 (Cal. July 23, 1992), *and review dismissed, case remanded to Ct.App.* (July 15, 1993).

[5]Party Respondents did not object to the reference to a special master, but only the Court's decision to apportion the cost of the special master among the parties. The Party Respondents argued that since the reference was necessitated by Petitioners' misconduct, they should incur

The decision to appoint a special master marked a turning point in this litigation. As a result, the logjam which had been erected was broken and this case started moving forward again. Hearings were conducted, transcripts of proceedings were maintained and recommendations were issued by the Special Master, all subject to the *de novo* review of the district court.

Like many other judges, Judge Ideman typically does not conduct oral argument unless he requests it or the parties can demonstrate it is necessary. With that practice in mind, Petitioners routinely filed extensive motions for review before the district court accompanied by the complete record of the proceedings before the Special Master. Rather than identifying any alleged mistakes of law or fact, however, Petitioner' motion practice was characterized by repetitive reargument.

In some instances, Petitioners merely *repeated and re-argued* what had been presented repeatedly to the *Special Master:*

> "Plaintiffs have conceded that this motion was not filed due to the emergence of new law or facts. It is also clear that this motion was not filed due to a manifest showing of the failure to consider material facts previously presented to the court. Rather, this motion was filed due to an incorrect and unreasonable assumption that the Special Master's disagreement with plaintiffs' interpretation of the law and facts necessarily arises from his fundamental misunderstanding of the law and facts. This simply is not a basis for reconsideration under Rule 7.16. As such, the filing of the instant motion was patently unreasonable and sanctions are in order."

(Special Master's Memo. Opin., 7/2/91, at 4). (19a). In such instances, the district court had the "benefit" of an expanded record generated by Petitioners' repetitive motion practice.

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the costs for the Special Master. The district court responded by requiring the parties to share costs initially subject to re-allocation at a later time. To that end, the district court subsequently ordered Petitioners to reimburse the Party Respondents for their share of the Special Master fees as a recoverable cost following the dismissal of Petitioners' two amended complaints.

In other instances, Petitioners repeatedly *re-argued* matters before the *district court:*

> "The Plaintiffs' motion for reconsideration of the Court's April 27, 1990 order adopting the April 3, 1990 discovery order of the Special Master is hereby DENIED.
>
> * * *
>
> The Plaintiffs have made no showing at all of the Court's failure to consider material facts or issues. When the Court adopted the Special Master's order, the Court concluded that none of the Plaintiffs' objections had merit. The Court did however, comment on the areas where it thought some additional guidance was required. No additional comment by this Court was required since it adopted all of the Special Master's findings and orders. What the Plaintiffs are alleging by this motion is that the Court did not read all of the Plaintiffs papers. *The Plaintiffs can be assured that the Court read and carefully considered all of their objections.* As a whole, the Court found them without merit and agreed with the Special Master's findings and order." (Emphasis supplied)

(Dist. Ct.'s Order, 8/20/90, at 2-3). (21a-22a)[6]

Moreover, in yet other instances both before the Special Master and the district court, Petitioners *re-argued* issues *already decided* in the case. For example, by the time the district court issued an order upon review the issue would have been the subject of prior orders of Judge Pfaelzer, and/or recommendations of the Special Master adopted by the district court. Accordingly, in several instances the district court concluded on the frequently duplicative record before him that the Petitioners' motions had no basis in law or fact for the same reasons set forth in the Special Master's recommendations.

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[6]Significantly, among others, the Petitioners failed to provide in its Appendix copies of either the Special Master's Memorandum Opinion or the district court's order cited above in the text.

The Petition does not identify a situation deserving of the extraordinary application of certiorari jurisdiction and is not a legitimate constitutional debate over a Rule 53 reference. As shall now be seen, the court of appeals appropriately declined to invoke mandamus jurisdiction and the district court acted well-within Constitutional prescribed parameters.

REASONS FOR DENYING PETITION

I.

THERE IS NO SPLIT AMONG THE CIRCUITS: IN THE NINTH CIRCUIT MANDAMUS IS AVAILABLE IN APPROPRIATE CASES TO REVIEW A REFERENCE TO A SPECIAL MASTER

Petitioners construct a strawman when they contend that under the Ninth Circuit's test articulated in *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977): "mandamus almost certainly would not be available to correct . . . a usurpation of or failure to exercise jurisdiction." (Pet. at 15). In an *appropriate* case, mandamus *is* most decidedly available in the Ninth Circuit to review the scope of a district court's reference to a special master, a principle established by reference to the very authority cited by Petitioners on unrelated grounds.

In *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536 (9th Cir. 1987) (Pet. at 15) a Ninth Circuit panel had that very issue before it. The court of appeals, cognizant of its authority and responsibility as stated in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 77 S.Ct. 309, 313, 1 L.Ed.2d 290 (1957), demonstrated the flexibility inherent in the *Bauman* test and balanced the "conflicting indicators" present in the case before it as to the propriety of a referral pursuant to Federal Rules of Civil Procedure, Rule 53. In that case, where two of the five indicators were not present, it was concluded, nevertheless, that mandamus jurisdiction would be exercised *if* the order appointing the special master was clearly erroneous as a matter of law. Upon such consideration, the court of appeals concluded that the reference was not clearly erroneous and, therefore, the petition for writ of mandamus was denied. In so doing, the Ninth Circuit noted that,

specifically contrary to Petitioners' observations, its approach was consistent with other out of circuit cases such as *In re United States*, 816 F.2d 1083 (6th Cir. 1987).

Having disposed of the attention getting device of identifying an ostensible "conflict among the circuits", it also is apparent Petitioners were provided with a receptive forum by the Ninth Circuit. Prior to taking any action, the court of appeals requested responses from the Party Respondents and the district court. Only then, after Petitioners made a woefully inadequate effort to comply with the showing necessary under *Bauman*, did the court of appeals decline to assert mandamus jurisdiction. Indeed, Petitioners now tacitly concede that they have made no showing why this is *the* type of extraordinary case warranting the sparingly applied remedy of mandamus. (Pet. at 14-15).

II.

NOTWITHSTANDING THE AVAILABILITY OF MANDAMUS IN APPROPRIATE CIRCUMSTANCES, THE NINTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THIS CASE DID NOT SO QUALIFY

A. A Writ of Mandamus Is A Drastic Remedy Only Available In Extraordinary Situations

Appellate jurisdiction for consideration of a writ of mandamus is predicated on the All Writs Act, codified at 28 U.S.C. § 1651(a), which empowers Federal Courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and as agreeable to the usages and principles of law." From this statutory authority, appellate courts have developed the concept of "supervisory mandamus" enabling an appellate court to supervise the administration of a lower appellate or trial court. *See La Buy v. Howes Leather Co.*, 352 U.S. at 256, 77 S.Ct. at 313, 1 L.Ed.2d 290.

Concurrent with the authority of an appellate court to issue a writ of mandamus, is judicial recognition of the inherent preemptive nature of such action and the effect of granting such writs have on the administration of the lower courts including: (1) the

potential destruction of fair and prompt administration of justice by facilitating piecemeal litigation, *See, Kerr v. United States Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725, 732 (1976); (2) the subversion of the finality rule and/or disruption of the carefully delineated congressional scheme concerning matters reviewable by interlocutory appeals, *see Bauman v. United States Dist. Court*, 557 F.2d at 653; and (3) undermining the mutual respect between trial and appellate courts by creating the potential for substitution of the judgment of the reviewing court, *Id.*

In light of these policy considerations the remedy of mandamus is considered drastic and requires a showing of extraordinary circumstances to justify its issuance. This Court has observed:

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . As we have observed, the writ 'has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so'. . . . And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes the matter of 'jurisdiction', the fact still remains that 'only exceptional circumstances amounting to a judicial usurpation of power' will justify the invocation of this extraordinary remedy." (Citations omitted).

Kerr, 426 U.S. at 402, 96 S.Ct. at 2123-2124, 48 L.Ed.2d at 732. *Accord, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

B. The Law As Applied By The Ninth Circuit

In recognition of the potential disruption of the orderly administration of justice through unrestrained issuance of writs of mandamus, the Ninth Circuit has sought to create *guiding and limiting principles* to assess the propriety of requests for such extraordinary relief. *Bauman*, 557 F.2d at 653.

In *Bauman*, a detailed review of pertinent decision of this Court and prior Ninth Circuit decisions revealed the following

guidelines for issuance of preemptive writs such as mandamus: (1) petitioner has no other adequate means, such as direct appeal, to attain the requested relief; (2) petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the District Court's order is clearly erroneous as a matter of law; (4) the District Court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the District Court's order raises new and important problems or issues of law of first impression. *Bauman*, 557 F.2d at 654-655.

While the presence or absence of such guidelines or factors must be considered individually, all factors must be considered *cumulatively* through a weighing or balancing process (with conflicting factors thereby reconciled), *Bauman*, 557 F.2d at 655; and the appellate court must determine the "extent to which the case before the court does or does not conform with the guidelines." *National Org. For The Reform of Marijuana Laws v. Mullen*, 828 F.2d at 542.

As demonstrated herein, the factor by factor review required by *Bauman* serves only to highlight Petitioners' failure to establish their right to the extraordinary relief requested.

1. Petitioners Must Establish No Other Means Of Redress

An order of reference to a special master pursuant to Federal Rule of Civil Procedure 53(b) is generally recognized as a interlocutory order and is therefore not appealable except as assignable error from a final judgment. *See* 28 U.S.C. 1292(a); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 291, 61 S.Ct. 229, 234 n.4, 85 L.Ed. 189, 195 (1940) and *National Org. For The Reform of Marijuana Laws*, 828 F.2d at 540.

Since the District Court's Order appointing the Special Master is not an appealable interlocutory order, mandamus relief *may* be appropriate *provided* such extraordinary relief is merited by a review of the remaining factors. *Bauman*, 557 F.2d at 656 (extraordinary relief denied where only one of five factors established and/or where the remaining factors indicate relief is inappropriate).

2. Petitioners Must Demonstrate They Will Be Damaged In A Manner Not Correctable On Appeal

The petition for mandamus before the court of appeals did not contain any specific assertions of prejudice, or damage not remediable by an appeal from final judgment. As one court of appeals most recently held in denying a writ of mandamus seeking to vacate a reference to a special master:

> "Mandamus is an extraordinary remedy which 'should be dispensed sparingly and only in pursuance of the most carefully written prescription, not made available over the counter, on casual demand. It is not a substitute for interlocutory appeal.' *Recticel*, 859 at 1005. In its present posture, this case does not warrant a dose of such strong medicine. The record here is, for the most part, malady-free; and any symptoms of arguable error, if later shown to have blossomed into full blown diseases, are amenable to a traditional cure on direct appeal."

In Re Pearson, 990 F.2d 653, 661-662 (lst Cir. 1993). This factor therefore supported denial of the petition.

3. Petitioners Must Show That The Order Constitutes Oft-Repeated Error

Some decisions have suggested in assessing this factor that, for purposes of legal analysis, the District Court's order should be considered erroneous and thereafter a determination made as to whether this type of error is "often repeated." *See Merle Norman Cosmetics, Inc. v. United States Dist. Court, Cent. Dist. of California*, 856 F.2d 98 (9th Cir. 1988); *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1303-1304 (9th Cir. 1962), *aff'd mem. sub. nom. Arizona v. United States Dist. Court*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983), opinion supplemented, 709 F.2d 521 (9th Cir. 1983).

Petitioners, however, make no showing at all regarding under what circumstances the district court previously have referred matters to special masters. Certainly the repetitive referral of an entire class of cases such as all antitrust cases as present in *La Buy*, is *not* established. Moreover, this Court has indicated *La*

Buy's approval of the revocation of a reference to a master "is simply inappropriate where there is no showing of a persistent disregard of the federal rules" (i.e., a *pattern* of *improper* references of *cases* to special masters by the District Court). *Will v. United States*, 389 U.S. 90, 95, 104 n.14, 105, 88 S.Ct. 269, 270, 19 L.Ed. 305 (1967); *Accord, In re United States Department of Defense*, 848 F.2d 232, 237 (D.C. Cir. 1980). This factor consequently also supported denial of the petition.

4. Petitioners Need to Establish That The Petition Raises New And Important Problems Or Issues Of Law of First Impression

Assignments to a special master are adjudicated on a case by case basis pursuant to the provisions of Federal Rule of Civil Procedure 53. *See, Bauman*, 557 F.2d at 655 ("... rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.") and *Arthur Murray Inc. v. Oliver*, 364 F.2d 28, 32 (8th Cir. 1966) ("Every reference to a master, no matter what the litigation incident involved may be, and regardless of what may be the form or scope of the task sought to be referred, is within the application of the Rule.") Accordingly, although the facts may be different, no new or novel issues of law or first impression are posed by petitioners' application and, as such, this factor similarly supported denial of the petition.

5. Petitioners Must Establish That The District Court's Order Is Clearly Erroneous As a Matter Of Law

Perhaps of all the guidelines set forth in *Bauman* no other single criterion is as important in determining whether mandamus relief is appropriate as the determination of whether or not the District Court's Order was clearly erroneous as a matter of law. *See, Seattle Times v. United States Dist. Court For Western Dist. of Washington*, 845 F.2d 1513, 1515 (9th Cir. 1988) and *Christensen v. United States Dist. Court for Cent. Dist. of California*, 844 F.2d 694, 697 (9th Cir. 1988) ("The *key factor* to be examined is whether we are firmly convinced [the] district court erred...") (Emphasis supplied); *see also, Merle Norman Cos-*

metics, Inc., 856 F.2d at 100 ("A *highly significant*, although not always dispositive, criterion is whether the district court's order . . . is clearly erroneous as a matter of law.") (Emphasis supplied)

In this instance, the issue is whether the district court "abdicated its judicial responsibilities by the referral to a special master of limited pre-trial and discovery related matters, while reserving to itself ultimate decision making authority. (Rule 53(b), F.R.Civ.P.). In undertaking this analysis, the Ninth Circuit has adopted the "firm conviction" test to assist in determining whether a district court's interpretation of a statute is clearly erroneous as a matter of law:

> ". . . [W]e will characterize a ruling of the district court on a question of law as 'clearly erroneous' only when, after a full review of the authorities, we are *firmly convinced* that the district court's interpretation was incorrect" (Emphasis supplied).

In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d at 1306. As shall now be seen, a full review of the authorities indicates that the District Court did not err in the manner in which it exercised its reserved power to review the recommendations issued by the Special Master.

III.

THE DISTRICT COURT'S REFERRAL ORDER TO THE SPECIAL MASTER SHOULD NOT BE VACATED

A. *The Initial Referral Order Was Appropriate*

The district court identified several reasons upon which it based its decision to appoint a special master:

1. The *complexity* of the litigation involving RICO, Federal Trademark and Service Mark Infringement, the Sherman Act, the Copyright Act, various pendent state claims and numerous counter-claims;

2. The *number* of *parties* to the litigation;

3. The large *number* of *motions, motions for reconsideration and appeals*;

4. The *disproportionate amount of time and resources* the Court had to donate to this case to the detriment of other litigants;

5. The need to reduce the *estimated three month trial time*;[7] and

6. The pendency of the case since 1985. (Order, 9/13/89, at 1-3).

It was not until waiting six months following the appointment of the Special Master, and only after participating on the merits in proceedings before the Special Master and the receipt of a ruling dismissing their RICO claims, that Petitioners sought by way of a petition for writ of mandamus to the Ninth Circuit Court of Appeals to remove the Special Master in April, 1990. Pursuant to the court of appeals' request, written responses were filed by the district court judge then presiding over the case (the Honorable James M. Ideman), the district court judge formerly presiding over the case (the Honorable Mariana R. Pfaelzer), the assigned magistrate judge (the Honorable Volney V. Brown), and the special master (the Honorable James G. Kolts) (all submitting declarations to the effect that an exceptional condition existed warranting the appointment of a special master), and the Party Respondents.

In its response, the district court indicated that the Special Master "is now thoroughly familiar [with the case], much more so than anybody else." (4a). Moreover, neither the district court, nor the magistrate, had the time necessary to contend with the ever expanding issues which have arisen in the case. As a result, the district court concluded that it was "critical that the [appellate court] deny the writ of mandate so that the Special Master can continue his work." (5a). The magistrate added that: "contrary to the implication that the case was nearly ready for trial

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[7]As a result of the Special Master's efforts, at a hearing before the district court on November 29, 1993, the parties estimated a *two week* trial time.

when the Special Master was assigned . . ., discovery appeared to me to be as far from concluded as it was when the case was initiated in 1985." (11a). The magistrate concluded that this case "is indeed complex, burdensome and time consuming" (*Id.*) The comments of the magistrate mirrored Party Respondents' frustration in dealing with an adversary who has a policy of using litigation as a weapon.

In light of the reasons set forth by the district court, it was apparent that the referral to the Special Master was warranted in response to the "exceptional condition" which confronted the Court and was *not* clearly erroneous as a matter of law. The petition for writ of mandamus seeking to vacate the reference was denied on June 27, 1990.

This Court has cited reasons similar to those listed by the District Court in concluding that reference to a special master was necessary and appropriate. Thus, for example, the burden of a case on the court's calendar, already congested with criminal matters which have priority and other civil matters which require a fair apportionment of the court's time, was cited by this Court in denying a petition for mandamus to vacate a reference to a Special Master in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 47 S.Ct. 286, 71 L.Ed 451 (1927). For similar reasons, utilization of a magistrate in this case is unfeasible. As Magistrate Brown stated in his Declaration, the demands placed upon his time as a result of this case was "intolerable." Under such circumstances "masters may prove useful . . . when a magistrate is unavailable for lengthy and detailed supervision of a case." Rule 53, F.R.Civ.P. *Notes of Advisory Committee On Rules*, 1983 Amendment, Subdivision (a). *See also, Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 904 (7th Cir. 1980), *cert. denied*, 445 U.S. 1017, 102 S.Ct. 1710, 72 L.Ed.2d 134 (1982) ("The designation of a magistrate . . . while also viable, is a less satisfactory alternative as magistrates have numerous other duties . . .").

Now, three and one-half years later, Petitioners are back again arguing the order of reference and every order ostensibly adverse to them must be vacated notwithstanding that it was *their* litigation misconduct which has resulted in dismissal of their

complaints and imposition of monetary sanctions. In response to the court of appeals' request, the district court filed another declaration in connection with the underlying petition for writ of mandamus before the Ninth Circuit. At that time, the district court identified the real motivation behind Petitioners' challenge to the referee:

> "Plaintiffs are unhappy with Judge Kolts and me for insisting that they comply fully with discovery or forfeit their case. For this reason they wish to have our work set aside and begin anew with another judge who may, they hope, permit them to litigate their claims without complying with discovery, or, perhaps, to further punish the other parties with more years of expensive litigation. This they should not be permitted to do, especially by means of the limited review possible on an extraordinary writ."

(Declaration of the Hon. James Me. Ideman, 6/17/93, at ¶ 7). (24a, 25a).

Party Respondents submit that the court of appeals was right *again* when yet another panel subsequently denied for a *second* time Petitioners' petition for writ of mandamus seeking to vacate the reference to the Special Master and, for the additional reasons set forth below, the Court should deny the Petition for Certiorari.

B. The Reference Has Been Appropriately Conducted

1. The Scope Of The Reference Is Constitutionally Sound

As the linchpin for their entire argument, Petitioners contend that the district court acted improperly by referring this case to a special master "essentially for all purposes." (Pet. at 5). However, that is not an accurate description of the district court's referral order. This was not an all purpose reference. The Special Master was directed to hear and make recommendations regarding discovery and pre-trial motions. The district court reserved *to itself* the power to review all such recommendations and the actual trial of the case before a jury.

Accordingly, many of the authorities relied upon by Petitioners are substantively distinguishable. *La Buy v. Howes Leather Co.*,

involved a reference to a master *for trial; Burlington Northern Railroad Co. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), also involved a reference to a master of the *entire case*;[8] *Stauble v. Warrob, Inc.*, 977 F. 2d 690 (1st Cir. 1992), similarly involved a reference to a special master for *trial on the merits*; and *In re Bituminous Coal Operator's Ass'n, Inc.*, 949 F.2d 1165 (D.C.Cir. 1991), likewise involved a *blanket reference*, including *trial* of liability issues.

In one case however, *In re United States, supra*, a more limited reference, involving a reference to a special master to review and submit recommendations on motions for summary judgment and other potentially dispositive motions was partially vacated. In that case, the court of appeals noted the distinction drawn by other courts between referring a trial to a special master and referring pre-trial matters, but concluded that dispositive motions should not fall on the pre-trial matters side of the line. *Id.* at 1091.

The Ninth Circuit, however, has not adopted the Sixth Circuit's reasoning in this regard. Instead, the Ninth Circuit has followed the approach utilized by the Eighth Circuit as set forth in *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985) (*per curiam*):

> "We believe that the district court erred in granting the master authority to preside at trial on the merits of this case. We also believe, however, that the district court acted properly in granting the master the broad authority to supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact, the power to hear motions for summary

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[8]The *Burlington* case also stands for the proposition that *upon a proper showing* the Ninth Circuit will vacate a demonstrably improper reference to a special master *prior to appeal from a final judgment.* In *Burlington*, the court of appeals held even though an erroneous referral to a special master may not of itself constitute reversible error (citing *Adventures in Good Eating v. Best Places To Eat*, 131 F.2d 809 (7th Cir. 1942) (court of appeals may review and uphold master's findings even if reference was initially improper), where significant litigation issues remained to be decided an improper reference order (referring all matters, including trial on the merits) should be vacated.

> judgment or dismissal and to make recommendations with respect thereto."

Id. at 105. *Accord*, the Ninth Circuit's decision in *Burlington Northern Railroad Co. v. Department of Revenue*, 934 F.2d, at 1073 ("*In re Armco* similarly distinguished between properly letting a master hear and make recommendations on pretrial motions (summary judgment and dismissal) and improperly letting him preside at trial.")

Petitioners' argument that the district court's referral order ran afoul of Article III of the Constitution is not persuasive when, as here, the district court reserved to itself ultimate decision making authority and, in fact, implemented that authority. *United States v. Conservation Chemical Co.*, 106 F.R.D. 210, 233 (W.D. Mo. 1985) was the same case subsequently reviewed as *In re Armco Inc., supra.* To the extent the referral to a special master was approved it was because the district court, as here, addressed the limitations imposed by Article III:

> "The decisions in [*Northern Pipeline Const. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932); *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) and *Lehman Brothers Kuhn Lo, Inc. v. Clark Oil & Refinery Corp).*, 739 F.2d 1313 (8th Cir. 1984)] make it clear that delegations of authority do not violate Article III so long as the essential attributes of power remain vested in the Article III court. There is no requirement that all factual determinations be made by Article III judges in order to maintain the essential attributes of judicial power. Although waiver by consent may be one factor in determining whether Articles III guarantees are satisfied, consent is not necessary if there are sufficient limitations on the adjunct and if the ultimate decision making authority clearly remains with the District Court."

In *United States of America v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990), on *appeal* (not a petition for writ of mandamus) of a *trial reference* to a special master (as opposed to the more limited reference of discovery and pre-trial matters

involved in this case), the Ninth Circuit had occasion to decide whether an exceptional condition existed warranting the appointment of a special master. In concluding that such conditions existed warranting the referral to a special master, the Ninth Circuit relied upon the fact that the case was comprehensive and complex involving numerous supplemental proceedings and voluminous filings. Rejecting the argument that only complex cases qualify for reference to a special master, the court of appeals held:

> "The Suquamish assert that a question may be referred to a Special Master only when it is complex or involves special expertise. This contention is without merit. The district court may refer a matter to a master when 'exceptional conditions' are present in the case, not when the matter is itself exceptional."

Id. at 775, fn.6. In addition to the presence of such factors as complexity, size and multiple parties, this case had the unique presence of Petitioners' expressed policy of using litigation as a weapon to harass rather than to win. Under these exceptional circumstances, the appointment of a special master to help stem the abuse as both necessary and appropriate, was not clearly erroneous as a matter of law.[9] *See also, In re Thornburgh*, 869 F.2d 1503, 1508 (D.C. Cir. 1989):

> "Indeed, absent the *La Buy* problem of 'untoward or irretrievable delegation of judicial authority,' this court has been reluctant to 'interfere [ ] with [a district judge's] trial management by issuing a mandamus writ ordering that a special master reference be vacated.' "

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[9]Petitioners' citation to *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 991 F.2d 1080 (3rd Cir. 1993) is distinguishable. In that case the court of appeals found an *absence* of the exceptional circumstances necessary to give rise to a need for a special master, as opposed to use of a Magistrate. By contrast, in this case the district court submitted declarations of the two district court judges and the magistrate judge who previously had been assigned to the case, all concurring in the need to appoint a special master.

2. The District Court Has Not "Rubber-Stamped" The Recommendations Of The Special Master

Petitioners also contend that the district court's adoption of the Special Master's recommendations constitutes abdication of judicial responsibility because the district court's orders were too concise for their liking. Again, however, in support of their argument Petitioners resort to such cases as *Burlington Northern* and *Stauple*, both of which involved references to special masters for trials on the merits.

Moreover, also distinguishing this case from those cited by Petitioners, the briefing and record before the district court on the motions for review have been extensive. In many, if not all, transcript of hearings conducted before the Special Master were provided to the district court and counsel for both sides identified every conceivable relevant argument and fact to the district court before it issued its rulings. [10]

However, it was readily apparent that Petitioners' motions for review (constituting the overwhelming majority of such motions before the district court) were repetitive and merely re-argued what was said below in proceedings before the Special Master. Given the fact that the Special Master is a retired state court judge with twenty years experience on the bench, including appellate experience setting by designation, his opinions were, in large measure, cogent and well-reasoned. Accordingly, upon review, the district court did not have to re-invent the wheel when it drafted orders indicating that Petitioners' motions were not well-based in fact or law. *Cf. Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 712 (7th Cir. 1984) a case cited by Petitioners, where the court of appeals was reluctant to, and did not, vacate a referral order, *inter alia*, because the district court approved a special master's opinion rather than writing his own.

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[10]Thus, as the court of appeals noted in *Stauble*:

> "A judge may, of course, refer the fundamental issue of liability to a master without running afoul of the Constitution, so long as the judge is prepared to afford *de novo* review or otherwise to honer Article III's commands."

Stauble v. Warrob Inc., 977 F.2d at 698 n.13.

Moreover, in the opinions issued by the district court (most were written by the district court, only a few adopted the Special Master's recommendations without additional explanation), the reasons for the decisions were clearly discernable. It is also noteworthy that when Petitioners sought clarification of an order or moved for reconsideration, the district court invariably obliged them. Contrary to Petitioners' argument that the orders were too oblique, Petitioners knew exactly what the district court meant. Petitioners' actual argument is that they did not like the result, but that provides no ground for vacating the reference.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: December 3, 1993

Respectfully submitted,

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APPENDIX A

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RELIGIOUS TECHNOLOGY CENTER, et al., *Petitioners,* *vs.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent,* and DAVID MAYO, et al., *Real Parties in Interest.*	No. 90-70176 DC # CV-85-711-JMI (Bx) DC # CV-85-7197-JMI (Bx)

DECLARATION OF JAMES M. IDEMAN

I, James M. Ideman, hereby declare:

1. I am a judge of the United States District Court, Central District of California. This Court has requested a response by the District Court. My declaration, together with the declarations of Judge Pfaelzer, Magistrate Brown and Special Master Kolts, attached hereto as Exhibits A, B and C, respectively, constitutes such response.

2. Transfer of the Case To Me

On May 24, 1989, these cases were transferred to me from Judge Pfaelzer. At the time of the transfer, I conferred with Judge Pfaelzer and Magistrate Brown and their staffs. They advised me that the tremendous demands placed upon them by these cases had seriously affected their ability to handle their other caseload. Among the matters of which they advised me were the following: The docket entries (attached to Judge Pfaelzer's declaration) showed five-hundred and thirty (530) separate docket entries. As may be expected, such enormous

activity produced a huge file. This file at the time was in ninety (90) volumes. We had to clean out an entire storeroom in order to find a place to physically house this file. It alone, weighing hundreds of pounds, occupies the entire storeroom. Even to attempt to read the file would take months if one had nothing else to do.

They told me that essentially similar matters were pursued repeatedly but always with a somewhat different twist that required the expenditure of more judicial time, and, like cutting off the head of a hydra, each judicial decision seemed to spawn a half-dozen spin-off disputes. Counsel were so antagonistic to each other that court appearances would often become protracted shouting matches and at least one fist-fight occurred between counsel, either in the courtroom or immediately outside.

Contrary to plaintiffs' statement which gives the impression that discovery was essentially completed, this was far from the case. Numerous motions were pending before Magistrate Brown, as well as six (6) discovery motions. Magistrate Brown stated that if he were to stay on the case, he would be able to handle little or nothing else.

Five years into the litigation, summary judgment motions are still being brought, as well as other motions. Indeed, between November 1, 1989 and April 30, 1990, the Special Master has spent 113½ hours and his law clerk has spent 111 hours on this case, a figure which Judge Pfaelzer and I both regard as eminently reasonable.

3. Referral to the Special Master

As an active district judge with a full civil and criminal calendar, as is Judge Pfaelzer, I quickly realized that I could not fulfill my responsibilities to my other cases and the litigants and attorneys in those cases if I did not find a way to reduce the demands of this case on the system. I therefore decided early on to refer the matter to a Special Master. That reference was not made until September 1989, however, for the reason that it was difficult to find a judge willing to handle this case, since the propensity of the parties and attorneys to engage in bitter and protracted litigation is well-known to the local bench and bar.

After Judge Kolts agreed to accept the assignment, I made the reference to him on September 12, 1989. It is true that I did not consult the parties in advance, but I felt that would be a useless act since they had never agreed on anything else and I did not expect them to agree to this either. However, in case there was some valid reason that had escaped my attention why the reference should not be made, or if there was some particular objection to Judge Kolts, I gave the parties a chance to file written objections, which they did on September 22, 1989. On October 12, 1989, I confirmed my reference to Judge Kolts as Special Master.

4. The Dismissal of the RICO Claims

Plaintiffs waited almost six (6) months from the date that I confirmed the reference to the Special Master, October 10, 1989, before applying for this writ. They applied for the writ only a few weeks after the Special Master had recommended dismissal of the RICO claims. It thus appears to me that the event which triggered the application for the writ was not the reference to the Special Master, but the Special Master's recommendation that their RICO claims be dismissed.

Plaintiffs should understand that the Order to Show Cause re RICO claims is routine in these chambers, and is done in each case where RICO claims are made. I, and a number of other judges of this Court, have found that a great number of RICO claims are ultimately found to be without merit and their retention in the case complicates case management, makes settlement difficult and unnecessarily prolongs trials. Thus, a form was developed and counsel are required to justify their claims. Most RICO claims do not survive this process and are eliminated from the case at a relatively early time. The only difference in this case was that the claims were subjected to the scrutiny of two judicial officers, Judge Kolts and myself, instead of only myself. Contrary to the assertion that Judge Pfaelzer had previously ruled that the RICO claims were valid, this is not so. Judge Pfaelzer does not have a policy of issuing an Order to Show Cause re RICO claims and so a clear ruling was never requested nor made. Even if such a ruling had been made, I would be free, as the trial judge, to

change such ruling, just as Judge Pfaelzer could have changed her mind, but that was not the case.

5. The Cost of the Special Master

It is true, of course, that the parties are paying the cost of the Special Master. First, the parties are well able to bear this expense. Secondly, the parties will find that eventually the Special Master has produced a considerable savings for them and is a bargain. At the time I received the case, the documents revealed that the understanding of the parties was that the trial would be an open-ended affair lasting many months or even years. That, of courage, is intolerable and I have directed the Special Master, as one of his most important duties, to conduct such pre-trial conferences as may be necessary to shorten the trial time required by use of stipulations as to uncontested matters, winnowing of witnesses and exhibits, exclusion of inadmissible or repetitive material and such. If he can do this, and I am sure that he can, the parties will save a fortune in litigation expense.

In addition, plaintiffs claim that Magistrate Brown has a thorough knowledge of the case, whereas the Special Master is a stranger to it. This might have been so when the reference was first made, but with the passage of time, Magistrate Brown has forgotten a great deal about the case, as he states in his declaration, and Judge Kolts is now thoroughly familiar with it, much more so than anybody else.

6. Conclusion

I am responsible for approximately two-hundred seventy (270) other civil cases and some two or three dozen criminal cases, and my staff and I have obligations to the parties and attorneys involved in these cases. Magistrate Brown and his staff also have obligations to their caseload. The demands of the instant cases before this panel of the Court of Appeals require an amount of time that I do not have, and that Magistrate Brown does not have.

I consider it critical that this Court deny the writ of mandate so that the Special Master can continue his work.

Dated: May 16, 1990

JAMES M. IDEMAN

JAMES M. IDEMAN
United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California corporation, et al., *Plaintiffs,* v. ROBIN SCOTT, an individual, et al., *Defendants.*	CASE NO. CV 85-711 JMI
RELIGIOUS TECHNOLOGY CENTER, a California corporation, et al., *Plaintiffs,* v. LARRY WOLLERSHEIM, an individual, et al., *Defendants.*	CASE NO. CV 85-7197 JMI

DECLARATION OF MARIANA R. PFAELZER

I, Mariana R. Pfaelzer, hereby declare:

1. I am a judge of the United States District Court, Central District of California. I was assigned cases Nos. CV 85-711 and CV 85-7197 from the wheel in 1985. On May 24, 1989, I transferred these cases to Judge James Ideman.

2. Attached hereto and marked as exhibit 1 to this declaration are the docket sheets for cases Nos. CV 85-711 and CV 85-7197. These docket sheets were prepared and maintained by my secretary while the cases were active on my calendar.

3. As the docket sheets and court files show, there was continuous activity of the most contentious sort over the entire period these cases were assigned to me. At the time I assigned the cases to Judge Ideman, the papers and exhibits in the files were voluminous and there had been countless hearings and conferences before the Court and the Magistrate. The cases had

virtually exhausted this Court's resources and those of the Magistrate assigned to the cases. As the transcripts of Court hearings will reflect, the atmosphere of the litigation was acrimonious, agreement could never be reached on even the most routine matters, and no issue was ever disposed of without generating further motions and proceedings retrying the same issues in a different form. For these reasons, at the time of the transfer to Judge Ideman, this Court had been considering the appointment of a Special Master to preside over the remaining discovery proceedings and motions and to conduct a pretrial conference in anticipation of trial of the cases.

DATED: May 15, 1990

MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

EXHIBIT B

UNITED STATES COURT OF APPEALS
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, et al., *Petitioners,* v. DAVID MAYO, et al., *Respondents.*	CASE NO. CV85-711-JMI (Bx) DECLARATION OF VOLNEY V. BROWN, JR.

I, VOLNEY V. BROWN, JR. declare:

1. I am a United States Magistrate at Los Angeles. When the within action was originally filed, the Clerk drew Judge Pfaelzer's card as trial judge and my card as discovery Magistrate. By assignment of Judge Pfaelzer and later of Judge Ideman, I was the judicial officer ordinarily and regularly assigned to resolve discovery disputes from inception to September, 1989, when Judge Kolts was assigned as Special Master.

2. I am one of eight United States Magistrates at Los Angeles. Every eighth week, on average, I am the Criminal Duty Magistrate, and during this period all of my time, often including time in the evenings and on the weekend, is devoted to criminal matters. During the remaining seven weeks, I estimate that 35% of my time is devoted to adjudicating discovery disputes, 10% is devoted to settling cases, and the remaining 55% is devoted to adjudicating social security, prisoners, and *pro per* civil rights actions and habeas corpus petitions. I am regularly assigned to District Judges' committees and, as well, as the District Court Historian and Disaster Director at the Court House.

3. The attorneys in this action are unusually contentious. They appear to deny each other the most basic and ordinary professional courtesies, and to bring and prosecute motions for the purpose, *inter alia,* of inflicting work and expense on the other side. They have had the propensity of appealing significant rulings of mine to the District Judge, so that he/she must also expand much time thereon. I estimate that during protracted periods to 1989, their motions claimed more of my time than all of the other

scores of discovery matters assigned to me combined. I have never had a case for discovery which was even nearly so burdensome.

4. It is true that at one time I retained in my mind a number of significant facts concerning the case. This, however, is no longer true; I can now recall only the broadest outlines of the matter. Judge Kolts, one of the judicial officers who have been involved in the case, almost certainly now has the greatest factual knowledge of it.

5. I believe that it was at least partly at my instance that Judge Ideman appointed a Special Master. The burden of this case upon my time had become intolerable. I was forced to delay adjudication of numerous cases assigned to me, including some probably meritorious habeas corpus, Social Security and civil rights cases. Any lawful and just expedient should be adopted to assure that persons are not improperly incarcerated, needy people are not denied Social Security benefits and constitutional rights are not violated. The assignment of the Special Master has permitted me to cut my backlog and to address my own cases promptly.

6. It may be true that I have not complained of the complexity of the case (Motion, pp. 18-19), but it is indeed complex, burdensome and time-consuming. Issues do not stay resolved, but are endlessly presented in different form and/or appealed. The matter cries out for the appointment of a stern Special Master who can give it the very considerable time necessary to ready it for trial.

7. Contrary to the implication that the case was nearly ready for trial when the Special Master was assigned (Petition, page 12), discovery appeared to me to be as far from concluded as it was when the case was initiated in 1985. There were some six discovery motions then pending before me, and my experience was that resolution of these would certainly spawn a new round of motions.

8. If the Court of Appeals holds that it is not lawful or appropriate to refer a case such as this to a Special Master. an important — indeed a nearly indispensable — relief valve will be denied the District Court.

9. The cases cited by petitioners, to the effect that the trial judge should conduct the discovery to learn the case, are inapposite. I will not in any event hear the case.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

DATED: May 11, 1990

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

EXHIBIT C

James G. Kolts
1715 East Altadena Drive
Altadena, CA 91001
(818) 797-4883
Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al., *Plaintiffs,* vs. ROBIN SCOTT, an individual, et. al., *Defendants,*	CV 85-711 JMI (Bx) CV 85-7197 JMI (Bx)
RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al., *Plaintiffs,* vs. LARRY WOLLERSHEIM, an individual, et. al., *Defendants.*	DECLARATION OF JAMES G. KOLTS
AND RELATED COUNTER-CLAIMS	

I, JAMES G. KOLTS, hereby declare:

1. I am Special Master in the above matter appointed by the Honorable James Ideman, Judge of the District Court, Central District of California.

2. Said appointment was entered September 13, 1989.

3. At the time of my appointment, the following matters and motions were pending and to my understanding were to be disposed of in the order in which they appear:

a. Determine whether or not there were valid RICO claims filed by plaintiffs and counter-plaintiffs. b. Determine whether or

not the pendent claims filed by plaintiffs and counter-plaintiffs were valid. c. Plaintiff's motion for protective order re scheduling of depositions and discovery motions. d. Defendants' Mayo and Church of the New Civilization's motion for special setting. e. Six discovery motions.

(1) Defendant's motion to compel production of documents responsive to defendant's fourth request for documents.

(2) Defendant's motion to compel further production of documents and tapes responsive to defendant's second request for documents and sanctions.

(3) Defendant's motion to compel further production of documents by Church of Science Technology and Sanctions.

(4) Defendant's motion to compel production of documents responsive to subpoena duces tecum (Starkey).

(5) Plaintiff's motion for protective order.

(6) Plaintiff's motion for order rescheduling or limiting deposition of Joseph Yanny.

f. Plaintiff's motion to amend the complaint.

4. Declarant thereafter commenced an examination of records and submitted materials to determine an appropriate recommendation.

5. On January 9, 1990, declarant conducted a hearing with all interested parties represented.

6. At that time all of the parties present were offered an opportunity to argue and did so.

7. Declarant was and is of the opinion that the mandate of the District Court required the Special Master to determine the RICO and pendent claims questions on the then present state of the record.

8. Previous rulings on the RICO issues had been made from three to five years previous to this determination, and the posture of the case has changed considerably.

9. The issues presented at this time had not been directly, specifically and completely determined in earlier rulings, thus the need for the recommendation of the Special Master.

Dated: 5/10/90

/s/ JAMES G. KOLTS
JAMES G. KOLTS, Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, et. al., *Plaintiffs,* vs. ROBIN SCOTT, et al. *Defendants,*	CIVIL NOS. 85-711 JMI (Bx) 85-7197 JMI (Bx)
RELIGIOUS TECHNOLOGY CENTER, et. al., *Plaintiffs,* vs. LARRY WOLLERSHEIM, et. al., *Defendants.*	ORDER
AND RELATED COUNTERCLAIMS	

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

Plaintiffs have moved pursuant to Rule 7.16 of the Local Rules of the United States District Court for the Central District of California for reconsideration of the Special Master's April 26, 1991 order imposing an issues sanction for failure to provide ordered discovery. Plaintiffs proffer two arguments in support of their motion. First, plaintiffs assert that the Special Master violated the law by imposing discovery sanctions without first holding a full-blown evidentiary hearing in which plaintiffs could cross-examine defendants' declarants. Second, Plaintiffs assert that the Special Master's failure to listen to the NOTs tapes constitutes "a manifest showing of a failure to consider facts presented to the court" thereby justifying reconsideration. *See* Local Rule 7.16(c). Defendants have opposed the motion and have crossmotioned for sanctions pursuant Rule 11 of the Federal Rules of Civil Procedure.

II. DISCUSSION

A. MOTION FOR RECONSIDERATION

Plaintiffs' argument that they were denied an evidentiary hearing has no basis in fact or law. Aside from a lack of authority for the novel assertion that a full-blown evidentiary hearing is required in every motion for sanctions, here a hearing was certainly not required in light of plaintiffs' failure to comply with the local rule governing requests to cross-examine declarants. *See* Local Rule 7.5.4 of the Rules of the United States District Court for the Central District of California.

Moreover, plaintiffs' poor excuse for their eleventh-hour requests to cross-examine Mayo and Strattman is not a proper basis for reconsideration of the order. Regardless of whether or not plaintiffs received a late reply brief, they waited to file their requests the day before the hearing. They did not apply to be relieved of compliance with the local rules, nor did they explain why they failed to file these requests so late. Indeed, plaintiffs appeared to abandon the issue when defendants' counsel pointed out their total disregard for the local rules. (RT 20-22). If plaintiffs so strenuously desired to have an evidentiary hearing, they should have requested one prior to the day before the scheduled hearing. They cannot now win reconsideration based upon their own non-compliance.

Plaintiffs' other argument is equally unavailing. The Special Master did not fail to consider material facts presented to the court. At the hearing, plaintiffs argued that they should not be sanctioned because the tapes were the sole basis for NOTs and they had already produced all existing tapes. (RT 36-47). The Special Master considered and rejected this argument in part because defendants' excerpted transcript of the tapes supported their assertion that written materials were also being used to create NOTs. It is important to note that plaintiffs were free to submit additional portions or the entire transcript in support of their opposition. They did not. They cannot now win reconsideration based upon their own previous omissions.

B. SANCTIONS

The Special Master now addresses whether the instant motion for reconsideration is sanctionable under Rule 11. Both parties to this litigation constantly accuse each other of acting in bad faith and this particular motion is no exception. The Special Master, however, declines to answer the ubiquitous bad faith question because bad faith is not the touchstone for the imposition of sanctions under Rule 11. *See Chambers v. NASCO, Inc.*, 1991 D.A.R. 6585,6588 (U.S. Supreme Court 1991). Rule 11 imposes an objective standard of reasonableness as the basis for imposing sanctions. *See Id.; see also, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 1991 D.A.R. 2366 (U. S. Supreme Court 1991). Thus, regardless of a party's subjective intent, if it was objectively unreasonable to file a motion then sanctions must be imposed under Rule 11.

Here, all the objective factors favor a finding of unreasonableness. Plaintiffs have conceded that this motion was not filed due to the emergence of new law or facts. It is also clear that this motion was not filed due to a manifest showing of the failure to consider material facts previously presented to the court. Rather, this motion was filed due to an incorrect and unreasonable assumption that the Special Master's disagreement with plaintiffs' interpretation of the law and facts necessarily arises from his fundamental misunderstanding of the law and facts. This simply is not a basis for reconsideration under Rule 7.16. As such, the filing of the instant motion was patently unreasonable and sanctions are in order.

An order will follow.

* * *

ORDER

IT IS HEREBY ORDERED THAT plaintiffs' motion for reconsideration of the Special Master's order dated April 26, 1991 is DENIED. The Special Master also holds that the filing of the instant motion is sanctionable under Rule 11 of the Federal Rules of Civil Procedure and that accordingly the costs of opposing such motion should be borne by plaintiffs. THEREFORE IT IS

FURTHER ORDERED THAT plaintiffs pay defendants $7,380.00 forthwith.

IT IS SO ORDERED.

DATED: JULY 2, 1991

JAMES G. KOLTS
U.S. SPECIAL MASTER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al.,
Plaintiffs,

vs.

ROBIN SCOTT, an individual, et. al.,
Defendants,

RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al.,
Plaintiffs,

vs.

LARRY WOLLERSHEIM, an individual, et. al.,
Defendants.

AND RELATED COUNTER-CLAIMS

CV 85-711 JMI (Bx)
CV 85-7197 JMI (Bx)

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 27, 1990 ORDER ADOPTING THE SPECIAL MASTER'S DISCOVERY ORDER OF APRIL 3, 1990

IT IS HEREBY ORDERED:

1. The Plaintiffs' motion for reconsideration of the Court's April 27, 1990 order adopting the April 3, 1990 discovery order of the Special Master is hereby DENIED.

2. The Plaintiffs contend that since the Court did not address three of their objections in its April 27, 1990 order adopting the Special Master's discovery order of April 3, 1990, there has been a manifest showing of a failure to consider material facts presented to the Court before such decision. Local Rule 7.16. Those issues include: that certain requests if produced as ordered, would require the Plaintiffs to violate the 1st amendment rights of association and privacy which the Plaintiffs owe to their members; that certain requests are not just burdensome, but irrelevant; and that documents relevant to the antitrust claim are entitled to ecclesiastical protection.

3. Local Rule 7.16 states that "[a] motion for reconsideration of the decision on any motion may be made only on the grounds of . . . (c) a manifest showing of a failure to consider material facts presented to the Court before such decision."

The Plaintiffs have made no showing at all of the Court's failure to consider material facts or issues. When the Court adopted the Special Master's order, the Court concluded that none of the Plaintiffs' objections had merit. The Court did however, comment on the areas where it thought some additional guidance was required. No additional comment by this Court was required since it adopted all of the Special Master's findings and orders.

What the Plaintiffs are alleging by this motion is that the Court did not read all of the Plaintiffs papers. The Plaintiffs can be assured that the Court read and carefully considered all of their objections. As a whole, the Court found them without merit and agreed with the Special Master's findings and order.

In order to bring a motion for reconsideration, the party requesting reconsideration must establish a manifest showing of a failure to consider facts with more than just the assertions that are alleged here. The party must point to specific facts that were not considered by the Court. The parties are required to assume that the Court read and considered all of the information that it was provided in a motion. In order to obtain reconsideration on this ground the party must point to facts which could not possibly have been considered either because of erroneous statements made by the Court or conclusions that the Court made which can not be supported in any way by the facts of the case. *See* ***Backlund v. Barnhart***, 778 F.2d 1386 (9th Cir. 1985) (Where the Court held that a motion for reconsideration was properly denied if it presented no new arguments.)

In this case, the Plaintiffs have not pointed to facts which the Court failed to consider. Therefore, this motion is not properly brought under Local Rule 7.16, and should be denied.

IT IS SO ORDERED.

DATED: 20 August 1990

/s/ J. IDEMAN

JAMES M. IDEMAN
United States District Judge

DECLARATION OF HON. JAMES M. IDEMAN

I, James M. Ideman, declare as follows:

1. Portions of this petition will become moot because I have decided to recuse myself from this case. Plaintiff has recently begun to harass my former law clerk who assisted me on this case, even though she now lives in another city and has other legal employment. This action, in combination with other misconduct by counsel over the years has caused me to reassess my state of mind with respect to the propriety of my continuing to preside over the matter. I have concluded that I should not. I have delayed the effective date of my recusal, however, so that I could respond on behalf of my court to the allegations in the petition.

2. I should say at the outset that this case should soon be concluded in the District Court and thus available for appellate review. I am confident that such a review will reveal that the plaintiff's claims raised in this petition are groundless. I would strongly recommend that any definitive appellate action be deferred pending a thorough review on appeal and that years of work not be wiped out by granting petitioner's extraordinary writ.

3. The past 8 years have consisted mainly of a prolonged, and ultimately unsuccessful, attempt to persuade or compel the plaintiff to comply with lawful discovery. These efforts have been fiercely resisted by plaintiffs. They have utilized every device that we on the District Court have ever heard of to avoid such compliance, and some that are new to us.

4. This noncompliance has consisted of evasions, misrepresentations, broken promises and lies, but ultimately with refusal. As part of this scheme to not comply, the plaintiffs have undertaken a massive campaign of filing every conceivable motion (and some inconceivable) to disguise the true issue in these pretrial proceedings. Apparently viewing litigation as war, plaintiffs by this tactic have had the effect of massively increasing the costs to the other parties, and, for a while, to the Court. The appointment of the Special Master 4 years ago has considerably relieved the burden to this Court. The scope of plaintiff's efforts have to be seen to be believed. (*See*, Exhibit "A", photo of clerk with filings, and

Exhibit "B", copy of clerk's docket with 81 pages and 1,737 filings.)

5. Yet, it is almost all puffery — motions without merit or substance. Notwithstanding this, I have carefully monitored the Special Master's handling of these motions. I saw no need to try to improve on the Special Master's writings if I agreed with the reasons and the results. However, with respect to the major ruling that I have made during these proceedings, the dismissal of the plaintiff's claims, the following occurred:

6. The Special Master, after years of efforts to compel compliance with discovery, purported to order a dismissal of plaintiff's claims. Although the action was probably long overdue, the Special Master did not have the authority to make such a dispositive order. In reviewing his order, as I did with all of his actions, I saw what he had done and did not approve it. I treated the Special Master's "order" as a recommendation and gave notice to the parties that they could have a hearing and invited briefs. Only after considering fully the briefs of the parties did I give approval to the dismissal. It is true that I adopted the language chosen by the Special Master, but that was because I fully agreed with his reasoning and saw no need to write further.

7. Plaintiffs are unhappy with Judge Kolts and me for insisting that they comply fully with discovery or forfeit their case. For this reason they wish to have our work set aside and begin anew with another judge who may, they hope, permit them to litigate their claims without complying with discovery, or, perhaps, to further punish the other parties with more years of expensive litigation. This they should not be permitted to do, especially by means of the limited review possible on an extraordinary writ.

8. I respectfully recommend that the petitioner's claims that are not mooted by my withdrawal from the case be denied without prejudice to review of same upon appeal.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of June, 1993 at Los Angeles, California.

/s/ JAMES M. IDEMAN

James M. Ideman
United States District Judge

No. 93-558

(3)

Supreme Court, U.S.
FILED
NOV 21 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RELIGIOUS TECHNOLOGY CENTER, CHURCH OF SCIENTOLOGY INTERNATIONAL, and CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

DAVID MAYO, ADVANCED ABILITY CENTER, ROBIN SCOTT, ADRIENNE SCOTT, RON LAWLEY, MORAG BELLMAINE, STEVEN BISBEY, ADVANCED ABILITY CENTER CANDACRAIG, ADVANCED ABILITY CENTER EAST GRINSTEAD, CHURCH OF THE NEW CIVILIZATION, HARVEY HABER, JOHN NELSON, JON ZEGEL, VIVIAN ZEGEL,

Real Parties In Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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United States Constitution, Article III .....*passim*

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents' opposition studiously avoids the central issue raised by the petition: whether the continued and ongoing failure of the district court to exercise meaningful oversight and review of the actions of the special master on the critical and outcome determinative aspects of this case violates Article III of the Constitution. Respondents devote just over one page of their twenty-three page opposition to it (Opp. at 22-23), and their analysis is conclusory and empty. Instead respondents direct their primary attention to the propriety of the original referral (Opp. at 19-24), a question not directly raised by this petition,[1] and to the question of whether the district court's abdication of its constitutional responsibility is correctable by mandamus. On the latter question, respondents concede that the key consideration should be whether the district court's actions are "clearly erroneous as a matter of law" (Opp. at 14). By failing to address meaningfully the petitioners' central argument as to *why* the district court's actions are clearly erroneous as a matter of law, respondents have provided no cogent opposition to the petition.[2]

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[1] Petitioners, of course, objected to the original referral and unsuccessfully sought mandamus on that question in 1990. The *present* petition, however, while not conceding the propriety of the original referral, is directed at the *practice* of the district court in ceding its Article III responsibilities to the special master on an ongoing, *de facto* basis.

[2] Respondents' efforts to portray the prior history and delays in this case as due to abusive tactics by petitioners is absurd. The case was delayed in its earlier stages because of a lengthy vendetta engineered by respondents against the first District Judge to sit on the case, Hon. Mariana Pfaelzer, after Judge Pfaelzer stated on the record that she found respondent Mayo incredible as a witness on the key issues in this case. (See Petition at 4-5). Respondents made two motions to recuse Judge Pfaelzer from the case. On March 14, 1988, District Judge Harry L. Hupp denied the first motion as "mind boggling" and "ludicrous." The respondents immediately sought a writ of mandamus, which was denied. On April 11, 1989, Judge Hupp denied the second motion, finding it to have "no merit" and stating, in part, that respondents'

I. The Ninth Circuit Failed to Provide Mandamus Review to Correct an Abdication of the Judicial Role

The petition focuses upon the traditional and core function of mandamus as elucidated by this Court: "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *See De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945); *Ex Parte Perre*, 318 U.S. 578 (1943). The Ninth Circuit tests for granting or denying mandamus, as elucidated in *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977), and as applied in this case, not only fail to acknowledge the core function of mandamus, but undermine its use. Certiorari is sought, in part, to preserve the traditional function of mandamus jurisdiction, to compel a district court to exercise its Article III powers. As we show, numerous other circuits have upheld the use of mandamus precisely to correct a district court's abdication of its Article III role to a special master. *In re Bituminous Coal Operators' Association*, 949 F.2d 1165, 1168 (D.C.Cir. 1991); *In re United States*, 816 F.2d 1083, 1085 (6th Cir. 1987); *Pruden-*

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lurid allegations against the Judge were "unsubstantiated," "preposterous," and the "product of the paranoia (meant non-medically) which affects counsel when the litigation gets out of hand." Following these total rejections of respondents' abusive campaign against her, Judge Pfaelzer did remove herself from the case and transferred it to Judge Ideman, who then proceeded to abdicate his responsibilities to the special master, as set forth in the Petition.

While it is true that petitioners did seek to recuse Judge Ideman, their motion was based upon the acknowledged fact that a framed cover of the May 6, 1991 edition of *Time* magazine, which characterized the Scientology religion as a "Cult of Greed," hung on the wall in his chambers. Petitioners' recusal motion was not rejected out of hand in the same manner as respondents' earlier motions to recuse Judge Pfaelzer. Indeed, the Ninth Circuit acknowledged that "reasonable minds might draw different inferences from the facts alleged in the motion for recusal," but refused to intervene by mandamus because "the harm alleged in the petition is correctable on appeal . . ." Ex. VV. This Court denied certiorari. ____ U.S. ____, 112 S.Ct. 2273 (1992)

tial Ins. Co. v. *United States Gypsum Co.*, 991 F.2d 1080, 1083 (3rd Cir. 1993).

Respondents ignore the petition's argument that the Ninth Circuit's rule and decision here fails to provide for mandamus review in contexts which lie at the traditional core of mandamus jurisdiction. Respondents engage in an analysis of the five factors identified by the Ninth Circuit in *Bauman*, none of which involves a district court's abdication of its judicial role, thereby demonstrating the inadequacy or inapplicability of the *Bauman* standards to a traditional mandamus case such as this.

Respondents argue that, under *Bauman*, mandamus would have been appropriate and allowed in this case if the district court's actions were clearly erroneous as a matter of law. Opp. at 9, 14. This is highly unlikely, given the other *Bauman* criteria, which improperly preclude mandamus in a case such as this involving abdication of judicial powers, and given that the district court's abdication of its judicial role here was clearly erroneous, under applicable law of numerous circuits, *including* the Ninth Circuit. Indeed, to the extent that the Ninth Circuit panel found that the district court's actions here were not clearly erroneous, its decision was in conflict with recent circuit court decisions both within and without the Ninth Circuit, as shown in the Petition.

II. Respondents Fail to Dispute the District Court's Record of Consistently "Rubber Stamping" and Giving Dispositive Effect to the Actions of the Special Master

Respondents primary focus on the original *order of reference* to the special master is intentionally misplaced. In the petition, petitioners endeavored to demonstrate carefully the ways in which the district court has abdicated its Article III responsibilities to adjudicate the central issues of this lawsuit by failing to meaningfully review the special master's actions

and by treating them as if they were final orders. In particular, the district court has:

(1) Rotely and without analysis rubber stamped every order of the special master on motions to dismiss, motions for partial summary judgment, discovery motions, motions for discovery sanctions including imposition of issues and dismissal sanctions, and motions for attorneys fees. In so doing, the district court has never heard or even met with counsel, and has not written a single word of substantive analysis of the legal or factual issues involved.

(2) Permitted and approved the actions of the special master in giving final and preclusive effect to his own earlier orders, even though the district court failed to review those earlier orders *at all*. Thus, the special master was permitted to impose an ever escalating array of sanctions orders based upon earlier discovery and sanctions orders over which the district court failed to exercise review. The district court then rubber stamped the ultimate sanctions of dismissal and attorneys fees, and dismissed as moot the petitioners' earlier appeals from the earlier discovery and sanctions orders upon which the latter, more severe sanctions were based.

A growing body of case law has recognized that Article III prohibits a district court from merely "rubber stamping" the recommendations or determinations of a special master, particularly on questions central to and outcome determinative of a litigation. *Burlington Northern Railroad Co.* v. *Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991); *Stauble* v. *Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn., Inc.*, 949 F.2d 1165 (D.C. Cir. 1991) (Ginsburg, J.); *In re United States*, 816 F.2d 1083 (6th Cir. 1987). *See also Prudential Insurance Company* v. *United States Gypsum Company*, 991 F.2d 1080 (3rd Cir. 1993). These cases recognize that where there has been a reference to a special master, the district court must "reserve for [it]self, and not delegate to the special master, the core function of making

dispositive rulings, including findings of fact and conclusions on issues of liability." *In re Bituminous Coal Operators' Association, Inc.*, 949 F.2d at 1166.

Respondents' attempts to distinguish or avoid the impact of these cases is unavailing. The fact that the references in *Burlington Northern*, *Stauble*, and *Bituminous Coal* included *possible* trial (only *Stauble* went to trial) was not essential to the holdings in any of those cases. Each court emphasized that Article III required the district court to exercise independent judgment on the important and determinative questions of the case; none restricted its holding to review after *trial*, as opposed to summary judgment or other critical motions. *See, e.g., Bituminous Coal*, 949 F.2d at 1169 ("In sum, it is the function of the district judge . . . to decide dispositive issues of fact and law. . . . On remand, the district judge shall . . . retain for himself full authority and responsibility to try the case, to determine liability, and to decide *de novo*, without deferring to a special master, all potentially dispositive questions of fact or law"); *Burlington Northern*, 934 F.2d at 1068 (court reversed denial of preliminary injunction, decided on papers *prior* to trial); *Stauble* v,. *Warrob*, 977 F.2d at 695 and n.6 (district court must decide *de novo* "fundamental determinations of liability", disapproving "the determination of dispositive pretrial motions by the master"). See also *Prudential Insurance Company*, 991 F.2d at 1084, 1086 (Noting that "in this very case the matters consigned by the district court to the master involve proceedings having to do with motions to dismiss, motions to strike defenses, summary judgment motions, and discovery. . . .", and holding that "[a] district court has no discretion to delegate its adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate").

Respondents argue that because "the briefing and record before the district court on the motion for review have been extensive . . . the district court did not have to reinvent the

wheel" in denying petitioners' motions to review the special master's recommendations. Opp. at 22. The contention that briefing can justify the district court in summarily, and without analysis, affirming each and every recommendation of the special master was explicitly rejected by the Ninth Circuit in an earlier case:

> The district court acted as a "mere rubber stamp" for the findings and conclusions of the master. Although the court received memoranda from the parties, in its order it provided no substantive explanation for affirming.

Burlington Northern, 934 F.2d at 1074.

Respondents also complain that petitioners' motions for review to the district court "merely re-argued what was said below in proceedings before the Special Master" (Opp. at 22). Of course they did; it would have been improper for petitioners to make new and different arguments to the district court than they had made to the special master. As the cases, cited above, make clear, it was the duty of the district court to review those arguments independently and *de novo*; the "mere 'laying on of hands' by a district judge who adopts a magistrate's or master's recommendation of liability *pro forma* cannot inoculate a proceeding against the pathology that invariably follows from noncompliance with Article III." *Stauble* v. *Warrob*, 977 F.2d at 696.

It is important to note that respondents totally ignore the fact that the district court's abdication of its responsibilities here went beyond merely "rubber stamping" the special master's recommendations, without hearings or legal or factual analysis. Equally "an inexcusable abdication of judicial responsibility," *Burlington Northern*, 934 F.2d at 1072, was the district court's failure to review *at all* certain critical "recommendations" of the special master. As we have shown (Petition at 7-10, 22-23), the special master then bootstrapped upon these earlier, unreviewed recommendations his ultimate sanctions of dismissal and imposition of attorneys fees. The

district court then rubber stamped the latter orders, and dismissed as moot the petitioners' prior and still pending motions to review the earlier orders, *upon which the latter dispositive orders were based*. The special master, thus, was permitted to give final and conclusive effect to his earlier, unreviewed orders.

Respondents suggest that it was permissible for the district court to defer to the special master because the latter "is a retired [California] state court judge with twenty years experience on the bench . . ." (Op. at 22). That is not the point. The special master was not appointed by the President and confirmed by the Senate. He does not have life tenure. He is not a federal Article III judge, whatever may be his experience or lack of experience on the state courts. There is no basis to assume that the special master in this case was any more qualified, erudite or independent than the special masters in cases such as *Burlington Northern*, *Stauble*, *Bituminous Coal*, *In re United States*, or *Prudential Insurance*.[3] Whatever the background of the special master, he cannot be permitted to replace the federal judge in adjudicating the merits of the case.

Finally, respondents' attempt to obfuscate and obscure the degree to which the district court merely rubber stamped the special master's orders. They state that "the reasons for the decisions were clearly discernable, . . . the orders were [not] too oblique," and "petitioners knew exactly what the district court meant" (Opp. at 23). It is true that petitioners knew

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[3] It perhaps is worth noting that, as a retired state court judge, the special master would have gained little familiarity with the federal claims at the core of the case, including RICO, antitrust, and federal copyright and trademark claims. The special master, thus, was less familiar with or expert on the subject matter of the lawsuit than the special masters in several of the cases cited above, who were specialists on the questions which arose in those cases. See *Burlington Northern*, 934 F.2d at 1069; *Prudential Insurance*, 991 F.2d at 1086-87. *Cf.*, *Stauble* v. *Warrob*, 977 F.2d at 692, n. 2 (special master was retired chief judge of the Massachusetts Superior Court).

what the district court meant; it meant, "You lose." Other than that, the district court *never* provided the slightest explanation or analysis as to why petitioners lost.[4]

Given the district court's extraordinary abdication of its Article III responsibilities, the clearly erroneous nature of its actions, and the traditional availability of mandamus to correct such abuses, petitioners should not be required to undergo the extraordinary burden and expense of litigating this case before the special master to the bitter end, only to await appeal from a final judgment to vindicate their right to an Article III forum. Mandamus has always been available in circumstances such as this, "to compel [the district court] to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. at 26. Certiorari should be granted to insure that mandamus is available to correct judicial abdication of Article III powers, and to elucidate the standards governing use of special masters so as to render such mandamus review unnecessary in most cases.

[4] Respondents make reference to the order signed by the district court awarding them attorneys fees (Opp. at 6), in an attempt to suggest that on that occasion, at least, the district court wrote an opinion and analyzed the issues. Respondents ignore the fact that the order signed by the district court was prepared *in its entirety* by Mayo's counsel. See 32a. The only "independent" action taken by the district court was to strike the work "Proposed" from the order submitted by Mayo's counsel (28a), and (literally) to rubber stamp a facsimile of the district judge's signature to the order.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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